

**BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
100 Maryland Avenue, Room 200
Rockville, Maryland 20850
(240) 777-6660**

**IN THE MATTER OF:
CHRIST EVANGELICAL LUTHERAN CHURCH
OF BETHESDA-CHEVY CHASE,
Applicant¹**

Michael T. Foster²
Phil Perrine
Edward Wallington
Michael Lenhart
Marvin Tollefson
Melanie Folstad
Rebecca Wagner
Kenneth Dye
Susan Kirk
Deborah Miness
In Support of the Application

Stephen Kaufman, Esquire
Yum Yu Cheng, Esquire
Attorneys for the Applicant

Jim Humphrey, Montgomery County Civic Federation²
Steve Teitelbaum, Battery Park Citizens Association
Herbert Estreicher
Kenneth C. Doggett
William Doggett
Sara Gilbertson
Shawn Russell
Ralph Schofer
Geoffrey Uyehara
Bernard Wolfe
Patsy Wolfe
In Opposition to the Application

David Brown, Esquire
Attorney for Concerned Residents of Glenbrook
Road and Rugby Avenue and Herbert Estreicher

Report and Recommendation on Remand by: Martin L. Grossman, Hearing Examiner
Pre- and Post-Remand Hearings held by: Françoise M. Carrier, Former Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION ON REMAND

¹ The former co-applicant, BA Old Georgetown Road, LLC, withdrew from the case following the remand. Ex. 363.

² Those who testified in the post-remand hearing are listed first; those who testified only in the pre-remand hearing are indented.

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I. EXECUTIVE SUMMARY

Applicant:	Christ Evangelical Lutheran Church of Bethesda-Chevy Chase
LMA No. & Date of Filing:	G-864, filed November 29, 2006
Zoning and Use Sought:	Zone: PD-44 Use: a multi-family residential building (107 units, with a maximum height of 94 feet), and a new building combining a church and community center into a single edifice (maximum height of 78 feet). No commercial uses are proposed.
Current Zone and Use:	Zone: R-60 Current Use: Christ Evangelical Lutheran Church of Bethesda-Chevy Chase (the “church”), containing the church building, an adjoining three-story community building used by the church and other community groups for activities including social services and recreation, and three single-family detached homes that are used for a child day care center and other purposes. The site has a surface parking lot accessible from Old Georgetown Road, Rugby Avenue and Glenbrook Road.
Location:	At 8011 and 8015 Old Georgetown Road (Rt. 187), Bethesda, MD (on the eastern side of Old Georgetown Road, north of Glenbrook Road)
Road Abandonments:	Applicant applied to the County for abandonment of portions of Rugby Avenue and an alley off Glenbrook Road that lie within the subject site. The Council approved both abandonments on Feb. 3, 2009. Ex. 396.
Acreage to be Rezoned:	Approximately 1.87 acres of land. The area to be rezoned does not include the abandoned areas; the combined area is about 2 acres.
Base Density Permitted in Zone:	44 Dwelling Units per acre X 2 acres = 88 Dwelling Units
Bonus Density for MPDUs:	Additional Density Permitted with 15% MPDUs = 22% 88 DU + 22% = 107 DU Permitted (88 + 19 = 107)
Density Proposed by Applicant:	Up to 107 Dwelling Units, with 15% MPDUs (<i>i.e.</i> , 17 MPDUs)
Parking Required/Planned:	215 spaces are required / 236 are planned in an underground garage
Environmental Issues:	No significant environmental issues
Sector Plan:	2006 Woodmont Triangle Amendment to the Bethesda CBD Sector Plan
Neighborhood Response:	There is significant community opposition to this project, which centers around compatibility concerns by residents on both sides of Old Georgetown Road. There is support from church members, as well as from non-profit groups that provide community services in the area.
Technical Staff Recommends:	Approval
Planning Board Recommends:	Approval (3-1 vote)
Hearing Examiner Recommends:	Denial

II. STATEMENT OF THE CASE

Application No. G-864 was filed on November 29, 2006, by Applicant Christ Evangelical Lutheran Church of Bethesda-Chevy Chase and former Applicant, BA Old Georgetown Road, LLC. It requests reclassification from the R-60 Zone (single-family residential) to the PD-44 Zone (Planned Development, 44 dwelling units per acre) of 1.87 acres of land³ located at 8011 and 8015 Old Georgetown Road, Bethesda, Maryland, in the 7th election district. The subject site is identified on Tax Map HN23 as Parcels P860, P869, P816, P859; Lots 1, 2, 3, 4 and 11, Block B of Robertson's Addition to Bethesda; and Lot 9, Block C of Robertson's Addition to Bethesda.

Applicant's current proposal is to demolish the existing church and related structures on the site and construct two new buildings, a multi-family residential building with 107 units and a maximum height of 94 feet, and a combination church and community center, with a maximum height of 78 feet.⁴ No commercial uses are proposed.

The initial application was reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission ("MNCPPC") who, in a report dated August 24, 2007, recommended approval. *See* Ex. 98. Technical Staff submitted additional comments via e-mail, in response to questions from the Hearing Examiner, on July 9 and September 12, 2008. *See* Exs. 321 and 357. The Montgomery County Planning Board ("Planning Board") considered the initial application on September 6, 2007, and also recommended approval, though it observed that an improved design of the residential building might be needed to mitigate potential conflicts with existing single-family residences. Ex. 102 at 1-2.

³ The area to be rezoned does not include the area of a street (part of Rugby Avenue) and an alley (off of Glenbrook Road) that lie within the site and that the County Council declared abandoned at the request of Applicant (Exhibit 396); the combined area, including the abandoned area, is about 2 acres. It is this figure which is used to calculate density.

⁴ The original development plan had proposed to retain the existing church structure and add two new buildings – a community center building and a residential building. The revised plan will reduce the floor area of the overall church and community center from the original proposal by approximately 11,314 square feet, and the proposed residential building has been reduced by approximately 13,884 square feet.

Former Hearing Examiner Françoise Carrier conducted a public hearing regarding the initial proposal on June 6, June 24 and September 9, 2008. The record closed on October 30, 2008, and Ms. Carrier issued her report recommending denial of the application on December 15, 2008, based on her finding that the size, bulk and locations of the new construction proposed for the site would be incompatible with single-family homes in the immediate vicinity, and therefore would not substantially comply with the applicable master plan or the purposes of the zone.

The District Council heard oral argument on February 3, 2009, and decided to remand the case for further proceedings, to give Applicant the opportunity to revise its plans consistent with the findings of the Hearing Examiner (Resolution 16-838). Applicant did submit a revised development plan, and it was reevaluated by Technical Staff (Exhibit 385) and the Planning Board (Exhibit 392), both of which again recommended approval. The Planning Board approval was by a vote of three to one.

Further hearings were held by former Hearing Examiner Carrier on February 19, 22 and 23, 2010. After additional submissions by the parties, the record closed again on March 28, 2010. Because of Ms. Carrier's departure from the Office of Zoning and Administrative Hearings to become Chair of the Planning Board, she did not have the opportunity to write a report and recommendation on this case. The Hearing Examiner's time for submitting a report was therefore extended by the Council until September 30, 2010 (Resolution 16-1430). The extensive record in this case was reviewed by Hearing Examiner Martin Grossman, who prepared the instant report and recommendation on remand.

In an effort to simplify review and understanding of the record, parts of the original December 15, 2008 Hearing Examiner's report have been consolidated with this report to create one unified document. Portions of the description and analysis from Ms. Carrier's December 15, 2008 report have been updated, and they are reproduced herein, often without quotation marks or notations of attribution. Superseded materials, analysis, findings and conclusions have been removed and new materials, analysis, findings and conclusions have been added to reflect significant developments since the

remand. The entire summary of the pre-remand hearing has been retained for easy reference, although portions of it are no longer relevant due to revisions of the development plan. A new summary of the post-remand hearing has been added in a separate section.

The revisions to the development plan proposed by Applicant (Exhibit 417(a)) have changed the compatibility analysis, and this is now a closer case; however, for the reasons discussed below, the Hearing Examiner recommends denial of the application on grounds that the proposed changes, while improving compatibility with the single-family homes to the east of the site, have not eliminated the compatibility problems stemming from the height, bulk and location of the new buildings. Moreover, the revised plans have exacerbated compatibility problems vis-à-vis the Battery Park neighborhood across Old Georgetown Road to the southwest of the site, by pushing the mass closer to the roadway in an effort to improve compatibility with adjoining properties, as suggested by the Battery Park Citizens Association. Ex. 400.

III. FINDINGS OF FACT

A. Subject Property

The subject property consists of approximately 1.87 acres of land located at the northwest corner of Old Georgetown Road and Glenbrook Road in Bethesda, just north of the Bethesda Central Business District (“CBD”). The site is irregularly shaped, with approximately 320 feet of frontage along Old Georgetown Road on the south, 180 feet of frontage along Glenbrook Road on the east, and a depth of approximately 310 feet along its western property line. The center of the site’s Old Georgetown Road frontage is occupied by the church building, a traditional, brick church with a tall spire.

A three-story, brick-and-frame building located adjacent to the church to the east and connected to the church by a breezeway is used as a community center. Immediately west of the church is a two-story residential building that formerly housed the Bethesda Fellowship House, an elderly day care center serving people with Alzheimer’s disease, and is currently a rental dwelling. The rear part of the

site holds a surface parking lot with 62 spaces. The subject site also contains two single-family homes, one located behind the community center facing Glenbrook Road, and the other behind the parking lot facing Rugby Avenue. The Rugby Avenue house is used for a child day care program and the Glenbrook Road house for emergency shelter and social services.

The subject property contains a number of trees, shrubs and grassy areas near the buildings and along Old Georgetown Road. There are no wetlands, floodplains, forests, streams, rare or endangered species or critical habitats on the property. There are no historic features on or adjacent to the property. The photographs below show three views of the site from Old Georgetown Road.

Church and Part of Community Center Seen from Across Old Georgetown Road, Ex. 337



Subject Site Seen from Old Georgetown Road Heading West, Away from CBD. Ex. 28(a)



Subject Site Seen from Old Georgetown Road Heading East Towards CBD. Ex. 30(a)



The general shape and location of the subject property, as well as the surrounding area, are shown on the following map from Attachment 1 to the Remand Staff Report (Ex. 385).

Vicinity Map, Attachment 1 to the Remand Staff Report (Ex. 385)



B. Surrounding Area

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in a floating zone case than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account areas that would be most directly affected by the proposed development.

In the pre-remand case, Technical Staff described the surrounding area as bounded by Battery Lane to the north and west, Wilson Lane to the south and Woodmont Avenue to the east. See Ex. 98 at 2. Technical Staff did not modify its surrounding area definition in its remand report (Ex. 385). Applicant’s land planner, Phil Perrine, proposed a somewhat smaller surrounding area, bounded by Battery Lane to the north and west, Del Ray Avenue to the south, and the uses confronting the property along Old Georgetown Road, between Del Ray Avenue and Battery Lane, to the east. Mr. Perrine testified, however, that he also considers Staff’s surrounding area description to be acceptable.

The Hearing Examiner agrees with former Hearing Examiner Carrier’s finding that Mr. Perrine’s surrounding area definition was too restrictive, given the likelihood that the proposed eight-story building would be visible from across Old Georgetown Road for more than just the first row of homes. Accordingly, the Hearing Examiner accepts Technical Staff’s surrounding area description, including within it structures on the west side of Battery Lane between Keystone Avenue and Old Georgetown Road, as depicted on the previous page.⁵

The surrounding area contains a mixture of residential, office and institutional uses classified under the R-60 (single-family), R-10 (multi-family, high density), CBD (central business district) and C-T (commercial, transitional) Zones. To the west, the subject property abuts the Bethesda-Chevy Chase Rescue Squad, which, like the subject site, is classified under the R-60 Zone. The rescue squad

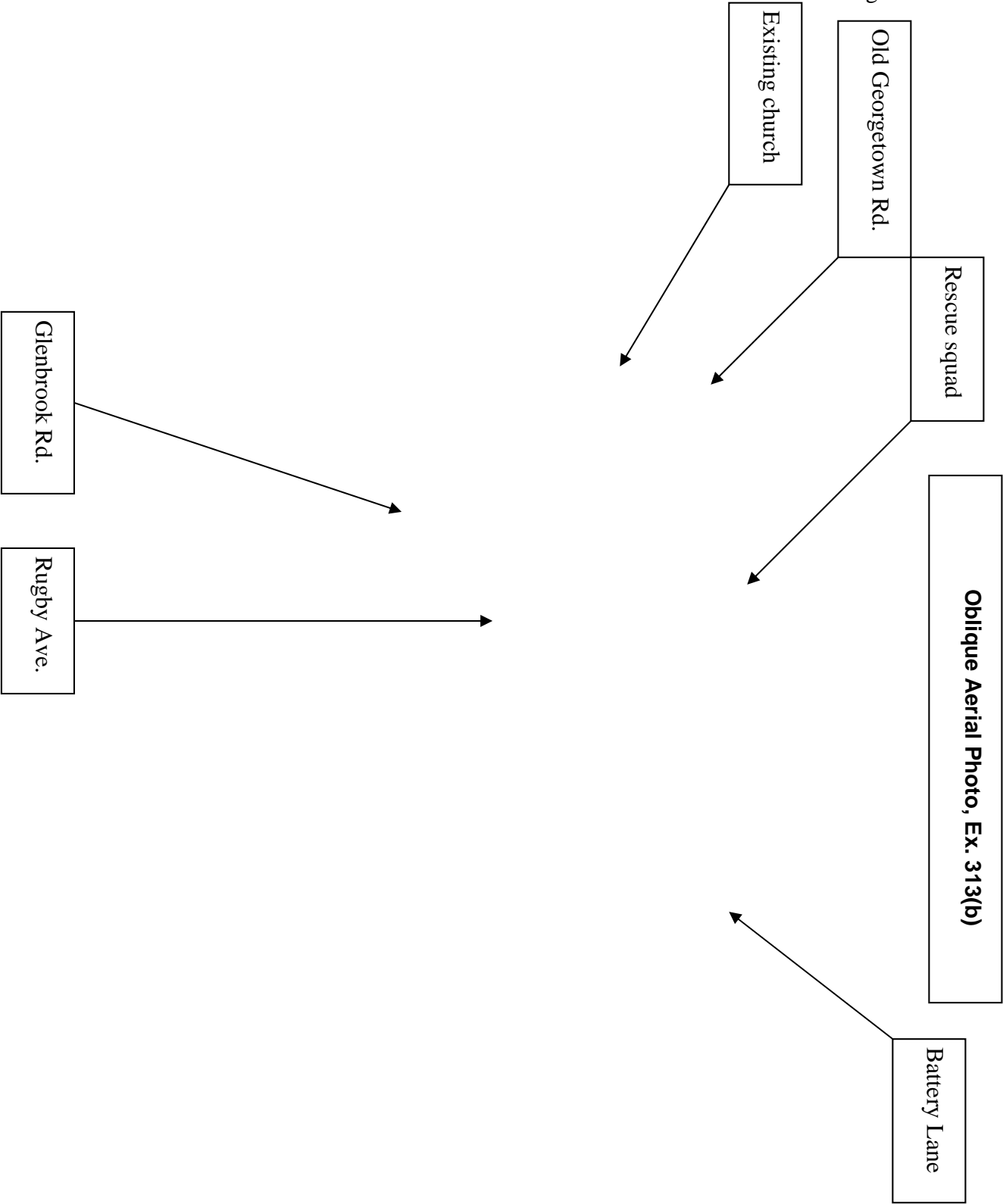
⁵ The surrounding area could justifiably have been extended even further to the northwest to include homes east of South Brook Lane which might have a view of the proposed buildings. However, given the existence of large structures on Battery Lane which might block that view, and to be consistent with the earlier definition of the surrounding area, the Hearing Examiner will accept the definition that has already been used in this case.

property contains an institutional building estimated at 25 to 30 feet in height, with the rest of the site occupied by surface parking. Farther west are single-family homes in the R-60 Zone and a smattering of multi-family and commercial buildings in the R-10 Zone. These buildings range from three stories in height to a 12-story multi-family building along Battery Lane.

To the north and northeast, the subject property abuts and confronts a small residential enclave in the R-60 Zone, consisting of approximately 20 single-family detached homes on Rugby Avenue and Glenbrook Road. The two roads meet at a joint intersection with Norfolk Avenue, forming a roughly triangular residential neighborhood. Farther north is a mixture of commercial and multi-family uses on the north edge of the Bethesda CBD, in the R-10 Zone, with a variety of building heights. Battery Lane Park is located one block northeast of the subject site, stretching up to Battery Lane.

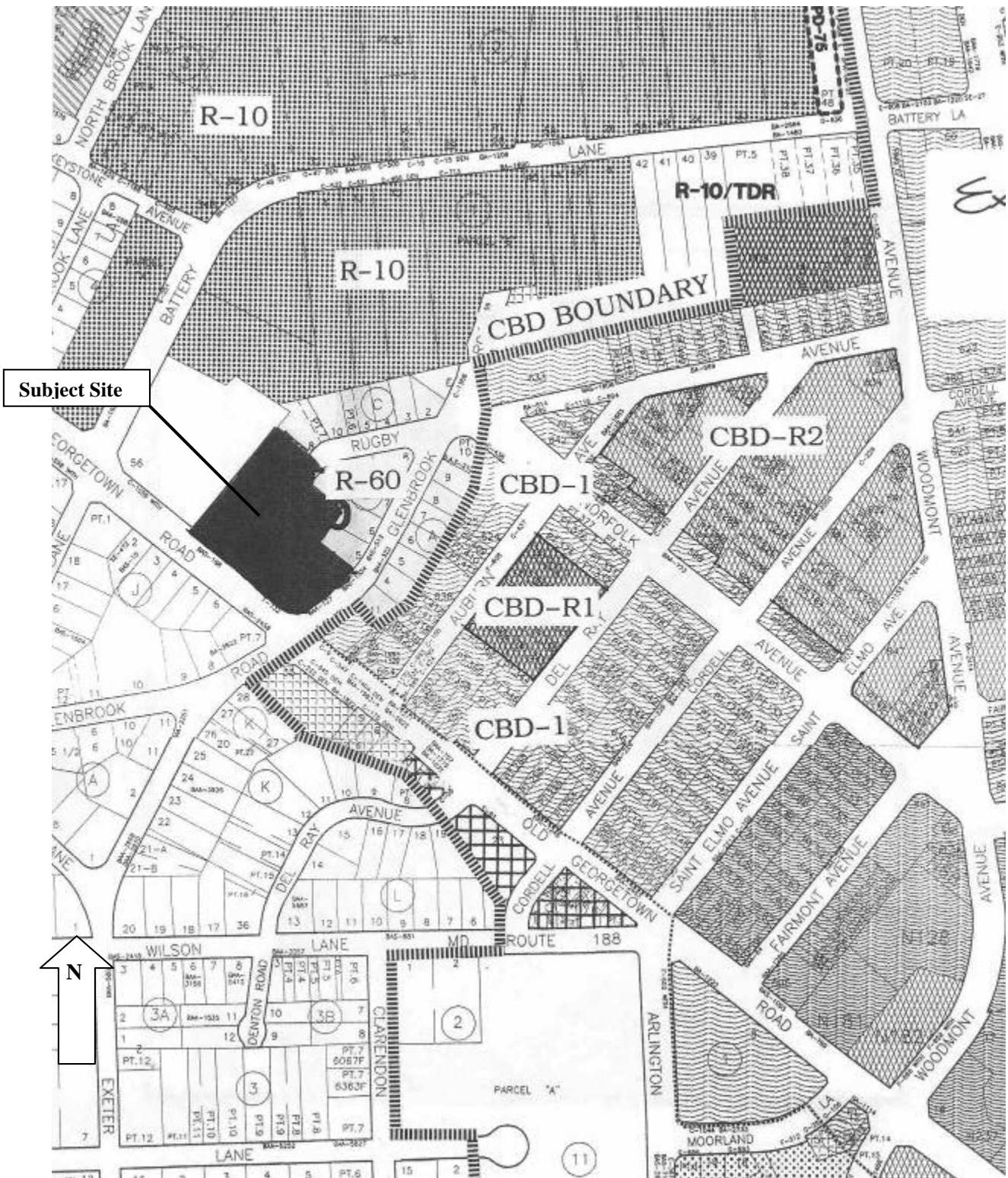
On the block backing onto Glenbrook Road to the east, just inside the CBD boundary at the corner of Auburn Avenue and Norfolk Avenue, a nine-story, multi-family building with retail on the ground floor has been approved for construction. Directly to the east, the front part of the subject property confronts an eleven-story office building at the corner of Old Georgetown Road and Glenbrook Road in the CBD-1 Zone. That building is a legal nonconforming use; it does not comply with current zoning requirements, but is permitted as a “grandfathered” use. Farther east, on the same side of Old Georgetown Road, is the bulk of the Bethesda CBD, which contains buildings of varying heights, types and uses in three CBD Zones.

Across Old Georgetown Road, the subject site confronts single-family detached homes in the R-60 Zone. Diagonally across Old Georgetown Road to the southeast is an office building in the C-T Zone that has three stories facing Old Georgetown and four to the rear. Farther southeast on Old Georgetown are one- and two-story buildings with commercial services and retail. To the south and west is the Battery Park single-family neighborhood in the R-60 and R-90 Zones, stretching away for many blocks. The relationship of the subject site to nearby land uses may be seen on the aerial photo on the next page.



The subject site's relationship to the CBD boundary and nearby zoning categories may be seen on the map below. Photographs of the Rugby Avenue/Glenbrook Road neighborhood follow.

Zoning Map, Excerpted from Ex. 269



Rugby Avenue Looking Northeast, Away from Subject Site. Ex. 333.



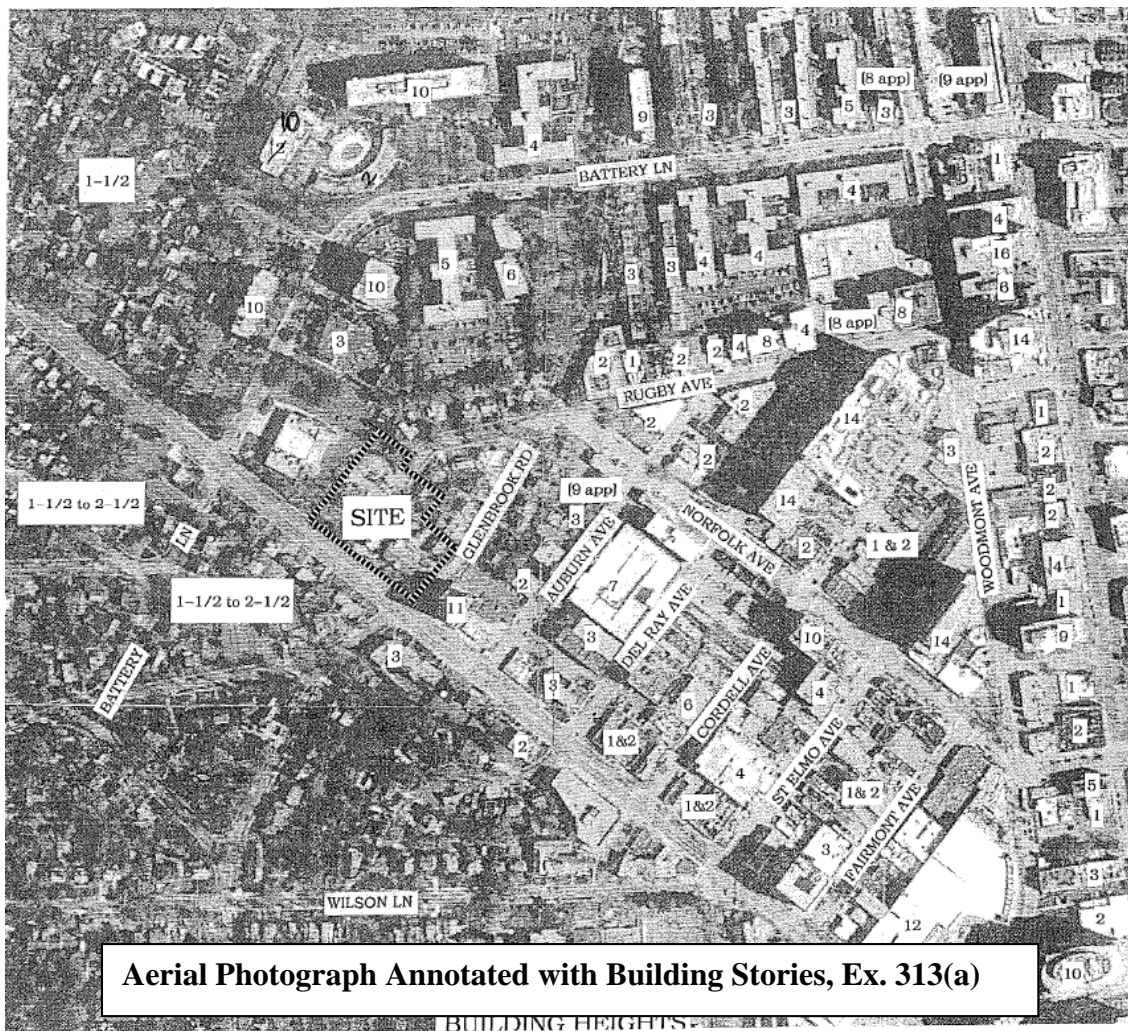
Glenbrook Road Looking Northeast. First House in Photograph is Wolfe Residence, Third House from Subject Site on Glenbrook. Ex. 332.



Rear of Home Abutting Subject Site on Glenbrook Road (Estreicher Residence), with Small House on Subject Site to Right and 11-Story Building on Corner of Old Georgetown Road and Glenbrook Road in Background. Ex. 345(b)



View 2



C. Zoning and Land Use History

The subject property was classified under the R-60 Zone in a 1954 comprehensive rezoning. R-60 zoning was confirmed by Sectional Map Amendment in 1977 (SMA G-20) and 1994 (SMA G-711). See Pre-Remand Staff Report (Ex. 98, p. 4). The Woodmont Triangle Amendment to the Bethesda CBD Sector Plan, adopted in 2006, recommended designating the property R-60/PD-44.

D. Proposed Development

Applicant's current proposal is to rezone the subject site to PD-44, demolish the existing church and related structures on the site and construct two new buildings, a multi-family residential building with 175,000 square feet of floor area, 107 dwelling units and a maximum height of 94 feet, and a combination church and community center, with 53,000 square feet of floor area and a maximum height of 78 feet. The pre-remand development plan had proposed to retain the existing church structure and add two new buildings – a community center building and a residential building. No commercial uses were proposed in either version.

Although the opposition in this case has justifiably argued that the current proposal must stand or fall on its own merits and Applicant agreed,⁶ it is useful to provide some comparison of the pre-remand proposal with the post-remand proposal to better understand the compatibility issues in this case. The revised plan will reduce the overall church and community center from the original proposal by approximately 11,314 square feet of floor area, and the proposed residential building has been reduced by approximately 13,884 square feet of floor area. These reductions have permitted increased setbacks from adjoining properties. The height of the proposed residential building has been reduced from 106 feet to 94 feet, although the height of the proposed church/community center building has

⁶ Technical Staff's remand report (Exhibit 385) was criticized by the opposition for "essentially compar[ing] the old original proposal, the old plan to the new one . . . There were no specific findings in the staff report that this new proposed plan, you know, is compatible on its own merits and so therefore, I think the staff report is not entitled to deference." Testimony of abutting land owner, Herbert Estreicher. Tr. 2-23-10 at 7. See statement of Applicant's counsel. *Id.* at 118.

increased from 76 feet to 78 feet. To help visualize the changes, simulations of the pre-remand proposal from two perspectives are set forth below, followed by post-remand simulations:⁷

Photo Simulation of Pre-Remand Proposed Development Looking West on Old Georgetown Road, Away from CBD. Ex. 29(a)



Photo Simulation of Pre-Remand Proposed Development Looking East on Old Georgetown Road, Towards CBD. Ex. 31(a)



⁷ Since the site has an eight-foot terrace, the original building height of 114 feet reported for the pre-remand proposal would be considered 106 feet under the definition of building height in the Zoning Ordinance. *See Tr. 2-22-10* at 55. The height of the newly proposed building is 94 feet per the Zoning Ordinance definition, 12 feet lower than the previous version.

The following two overlay perspectives depict the post-remand proposal (Exhibits 393 and 394):



Perspective Overlay of Post-Remand Proposed Development Looking West on Old Georgetown Road, Away from CBD. Ex. 394

Subject Site



Perspective Overlay of Post-Remand Proposed Development Looking East on Old Georgetown Road, Towards CBD. Ex. 393

Two other simulations submitted by Applicant help to illustrate the compatibility issues. They are “Building Context Views,” one from Old Georgetown Road (Exhibit 382(h)) and one from Rugby Avenue (Exhibit 382(i)). They are reproduced below and on the following page:

Ex. 382(h), Building Context from Old Georgetown Road



Subject Site



Ex. 382(i), Building Context from Rugby Avenue

Whether the proposed changes have sufficiently reduced the bulk and height of the proposed development and whether the proposed development will fit harmoniously with its surroundings are questions which will be discussed later in this report in connection with the issues of master plan compliance and compatibility.

Since both pre- and post-remand proposals called for 107 dwelling units, of which 15% would be moderately priced dwelling units (MPDUs), there would be a total of 90 market rate units and 17 MPDUs. The roof of the proposed multi-family building is proposed to be partly a green roof with environmental and recreational benefits. Tr. 2-22-10 at 19-20.

Reverend Tollefson, who has been the pastor at the church for more than 26 years, testified that the church considered all the possibilities after the remand, but quickly concluded that the best way to make a sizable change was to remove the existing sanctuary. It is very important to the church to serve the community, including providing affordable housing units. It is also important to have something that works in terms of the whole package – economics, greenness and the ability to serve people. Tr. 2-23-10 at 22-66

Reverend Tollefson indicated that the church intends for residents and church occupants to access and use all of the facilities and services connected with the project. He expects to work out an arrangement with residents of the new building and the larger community to make all of the facilities available to the community under a management agreement. Reverend Tollefson pledged the church's commitment to adhere to the written binding elements of the development plan, including the additional ones agreed to during the hearing. *See id.* at 37.

Using a "Programmatic Stacking Diagram" (Exhibit 403), Reverend Tollefson outlined the uses proposed on each floor of the new church/community center building. *See id.* at 44-49. The ground floor would have a lobby and the day care center. The next level would hold the two-level church sanctuary (with seating for 300), church offices, classrooms and a balcony. Above that would be offices for non-

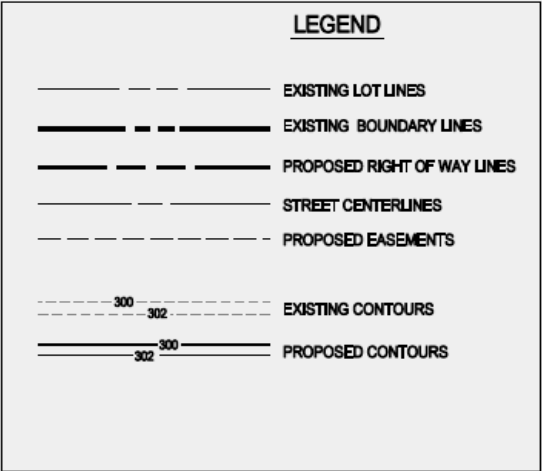
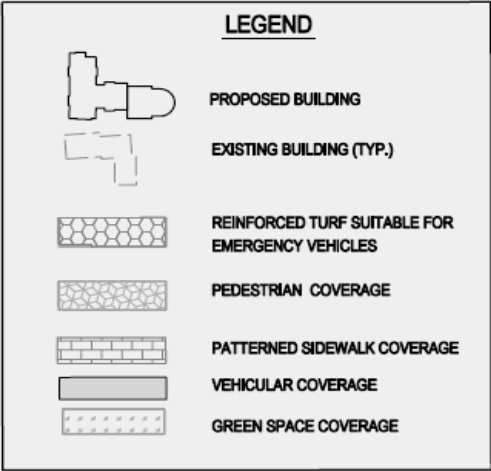
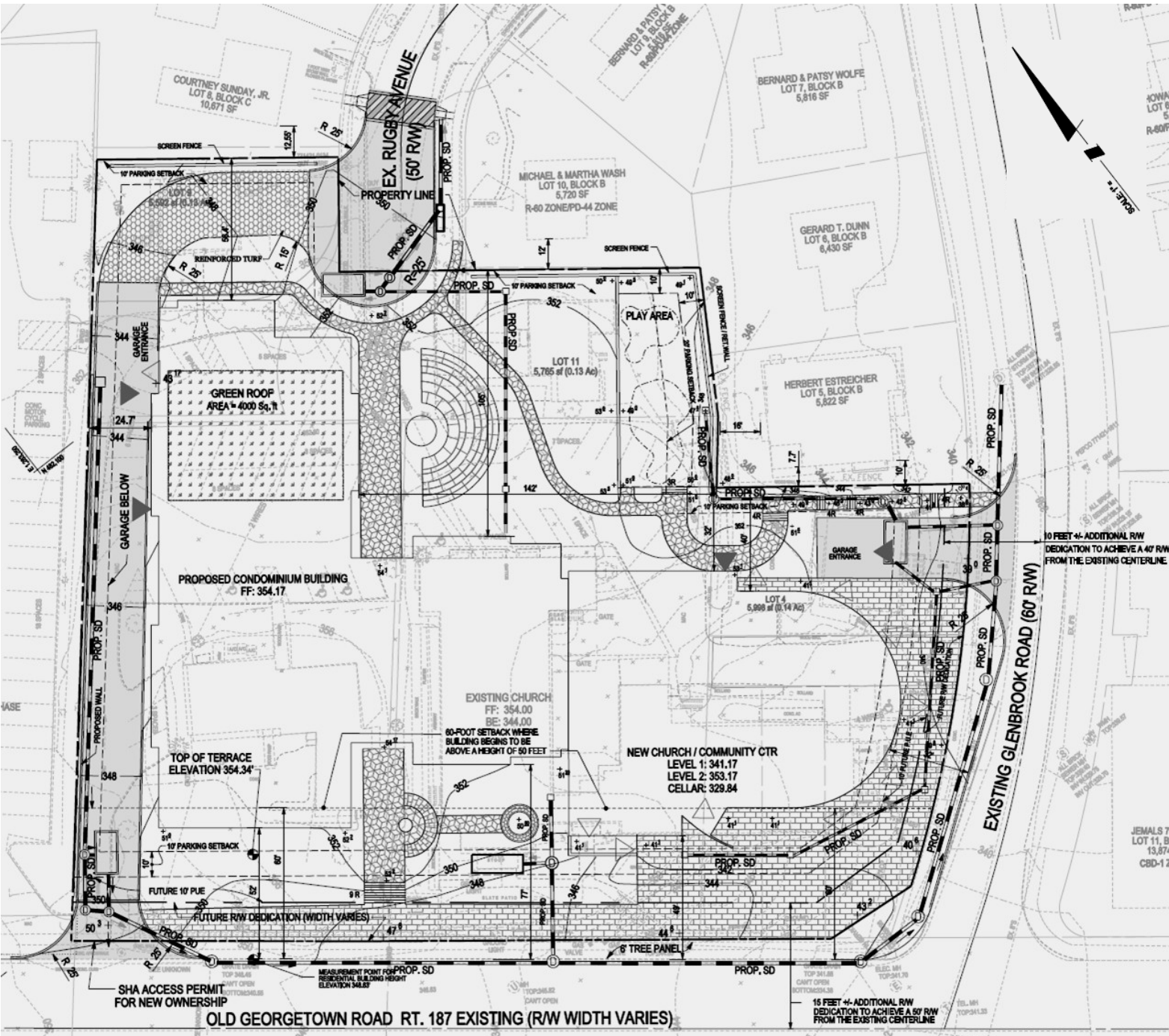
profit groups, and above that a two-level multi-purpose social/recreational/assembly space that may be used for senior or youth programs, community theater, music, etc. The multi-purpose space would be built on a basketball court design that qualifies for the local youth league, but is not a full court. *See* Tr. 2-23-10 at 59.

The vast majority of the parking would be contained within the below-grade levels of the proposed garage. Under the Zoning Ordinance, the residence would be required to have 153 spaces and the church/community center, 62 spaces, for a total of 215 required spaces. Applicant plans to provide a total of 236 parking spaces.

Three vehicular access points are planned for the site, Old Georgetown Road, Rugby Avenue and Glenbrook Road, although Binding Element 9 would limit the Rugby Avenue access to emergency vehicles.

E. Development Plan

Pursuant to Code § 59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone. This development plan must contain several elements, including a land use plan showing site access, proposed buildings and structures, a preliminary classification of dwelling units by type and number of bedrooms, parking areas, land to be dedicated to public use, and land intended for common or quasi-public use but not intended to be in public ownership. Code §59-D-1.3. Once approved by the District Council, the development plan is binding on the Applicant except where particular elements are identified as illustrative or conceptual. The project is subject to site plan review by the Planning Board, and minor changes to the plan may be made at that time. The principal specifications on the development plan – those that the District Council considers in evaluating compatibility and compliance with the zone, may not be changed without further application to the Council to amend the development plan. The principal component of the development plan in this case is a document entitled “Revised Development Plan,” Exhibit 417(a), which is reproduced on the following pages.



TEXTUAL BINDING ELEMENTS*

1. The density of the site will be limited to that permitted in the PD-44 zone, including the MPDU density bonus.
2. Primary access points will be from Old Georgetown Road and Glenbrook Road.
3. Within the 60' setback, measured from the face of curb of the existing Old Georgetown Road, the new buildings will not exceed 50' in height as measured from the terrace grade.
4. The maximum height of the residential building will not exceed 94 feet.
5. The maximum height of the church/community center will not exceed 78 feet.
6. The maximum number of dwelling units will be 107, including 15% MPDUs.
7. The green space will meet or exceed 50% of the gross lot area.
8. All green areas (including active/passive recreation rooftop green area) will be accessible to all residents or occupants of the buildings.
9. Except for emergency vehicles, no direct vehicular access from Rugby Road is permitted through the property.
10. The pedestrian path from Rugby Road to Glenbrook Road is to be opened to the public.
11. The location and footprint of the buildings, including the minimum setbacks, as shown on the Development Plan, are intended to set the location of the buildings. However, minor adjustments to the buildings' location will be permitted at site plan review to satisfy environmental site design and stormwater management requirements.
12. The upper three floors of the north wing of the residential building facing Rugby Road will be stepped back on a 1:1 ratio reflecting a 10-foot setback on each of the floors.

GENERAL NOTES**

1. Boundary information shown hereon and topographic Information, shown at 2' intervals on this plan, was obtained from field survey by Loiederman Soltesz Associates, Inc.
2. The site is to be served by public water and sewer systems and is presently classified in water and sewer categories W-1 and S-1, respectively.
3. The site lies within the Rock Creek Watershed. No portion of the site is in a floodplain, stream buffer, or wetlands.
4. Utility Companies:
 - Electric Potomac Electric Power Company
 - Telephone Verizon
 - Gas Washington Gas
 - Cable Television Comcast
 - Water Washington Suburban Sanitary Commission
5. This plan shows the relative location and configuration of the various components of the project and minor adjustments may be made at the Site Plan stage.
6. The Buildings will be built in one phase.

PROJECT DATA TABLE FOR PD-44		
	Zoning Ordinance Development Standards PD-44	Development Plan Proposed for Approval
Net Lot Area (SF):		
Gross Tract Area (SF)		81,404
Rugby Avenue Abandonment		4,043
Public Alley Abandonment		1,970
Gross Tract Area (Including Abandoned Area)		87,417
Less Dedications (Old Georgetown Road and Glenbrook Road)		6,659
Net Area =		80,758 SF
Gross Floor Area (GFA):		
Condominium Building		175,000
Church and Community Center		53,000
Total Gross Floor Area		228,000
Green Space Requirement	50% (43,708.5 sf)	52% (45,918 SF) *
(Based upon the Gross Tract Area plus abandoned areas (87,417sf).)		
Maximum Density Calculation:		
Maximum Base Density per Zone	44 du/ac	44 du/ac or 107 units**
Number of Dwelling Units (DU):		
Market Rate DU		90
Moderately Priced (MPDU) (15%)		17
Total Number of Dwelling Units		107
Maximum Building Height (FT):		
Condominium building		94'
Church Community Center		78'
Number of Floors:	Not Specified	8
Minimum Building Setbacks (FT):		
Front South (From Existing Face of Curb of Old Georgetown Road)		49'
Front East Side (From Existing Face of Curb of Glenbrook Road)		32'
West Side (From Property Line)		24.7'
Rear North (From Property Line)		56.4'
Parking:		
Residential Uses		
MPDU's - 17 units	@ 1.00 Spaces/Unit =17	
One Bedroom & 1 Br w/ Den Units – 21 units	@1.25 Spaces/Unit=27	
Two Bedroom & 2 Br w/ Den Units – 59 units	@1.50 Spaces/Unit=89	
Three Bedroom Units – 10 units	@ 2.00 Spaces/Unit=20	174 garage
Total Residential Spaces (including 2 HC accessible spaces)	153	174
Non-Residential Uses		
Church/Community Center	62	62 garage
Total Non-Residential Parking Spaces (including 2 HC accessible spaces)	62	62***
Total Parking Spaces	215	236
<p>* Including the green areas on the roof, which comprise 4000sf of the proposed green space. 41,918 sf of the proposed green space is on the ground plane. Land area devoted to green area is approximate and subject to change based on final engineering and further revision based on subsequent subdivision and site plan proceedings provided a minimum of 50% of gross tract area is green area.</p> <p>** The maximum density is based on 2.006 acres which include the abandoned areas. (2.006 ac x 44 du/ac = 88 du (Base Density + 19 (22% Bonus Density) = 107 (90 Market Rate and 17, or 15%, MPDU's)</p> <p>*** Total includes 5 HC accessible spaces in garage . Preliminary classification of number of bedrooms and number of parking space are subject to adjustment at the Site Plan Stage.</p>		

Exhibit 417(a) satisfies the requirements of Code § 59-D-1.3 by showing access points, the approximate locations of the proposed buildings, preliminary classification of dwellings by number of bedrooms, parking areas, intended right-of-way dedications for Old Georgetown Road and Glenbrook Road, and areas intended for common use but not public ownership (*i.e.*, the green roof, the ground level landscaped areas, setback areas and walkways).

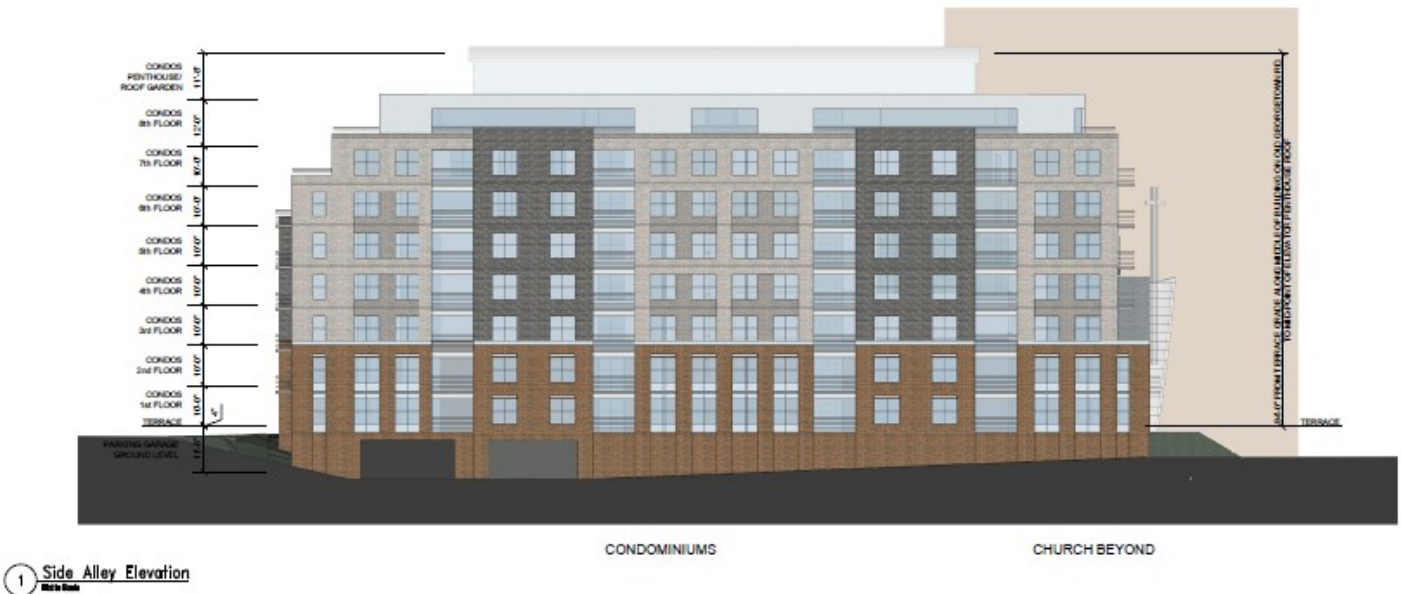
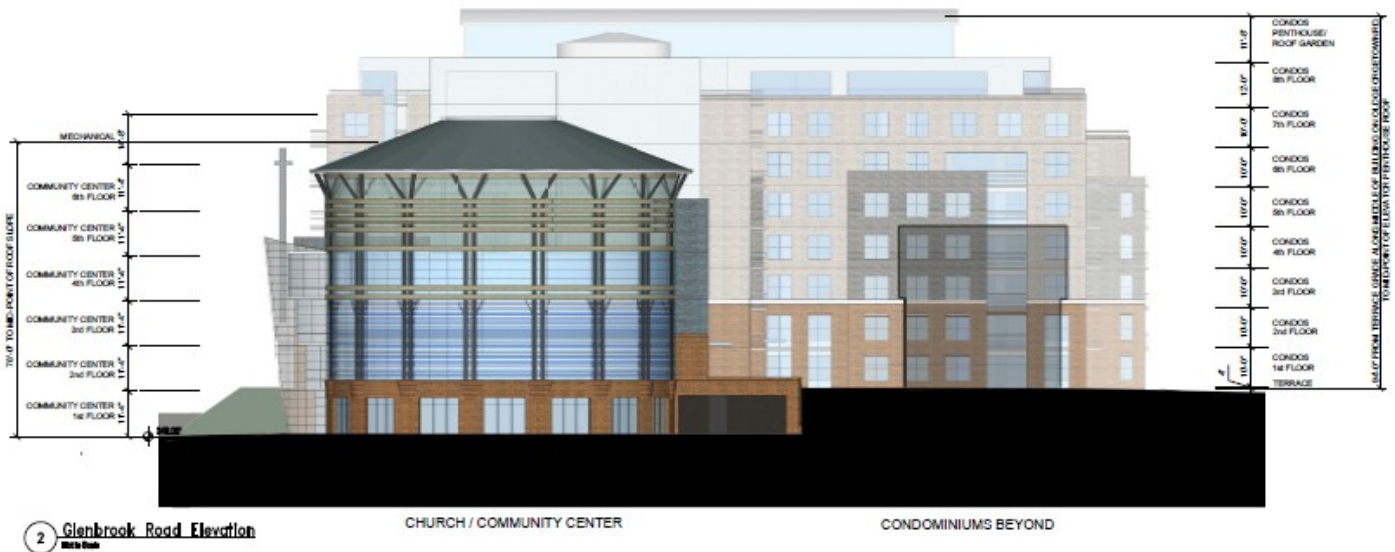
The Development Plan specifies twelve textual binding elements, which are items that the Applicant wished to make definite, but were more readily expressed in text than in the graphics. Many of these textual binding elements were added following the remand in an effort to meet concerns of the Planning Board, the Hearing Examiner and the community.

As stated in the General Notes (and in Binding element No. 11), minor adjustments may be made to the relative locations and configurations of the various components of the plan during site plan review. The intent of these notes is to allow for minor shifts in the building locations and footprints during the more detailed planning that takes place at preliminary plan and site plan review. General Note 6 states that the buildings will be built in one phase.

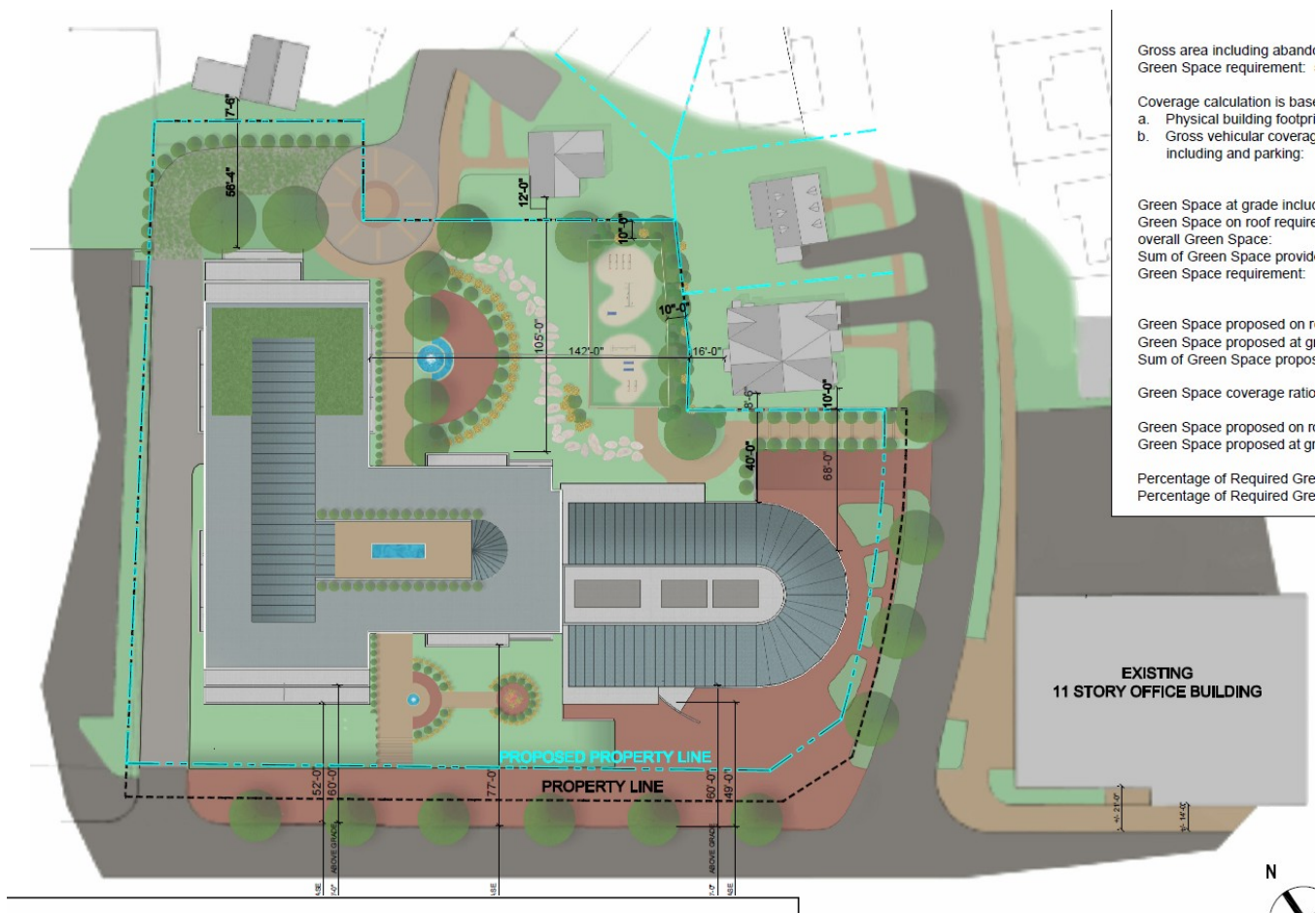
Finally, Exhibit 417(a) contains a “Project Data Table for PD-44,” which specifies applicable development standards and Applicant’s proposals. These include lot area, floor areas, green space, density, numbers and types of dwelling units, building heights, setbacks and number of parking spaces.

In addition to Exhibit 417(a), Applicant’s plans include elevations (Exhibits 382(j) and (k)), which are shown below:



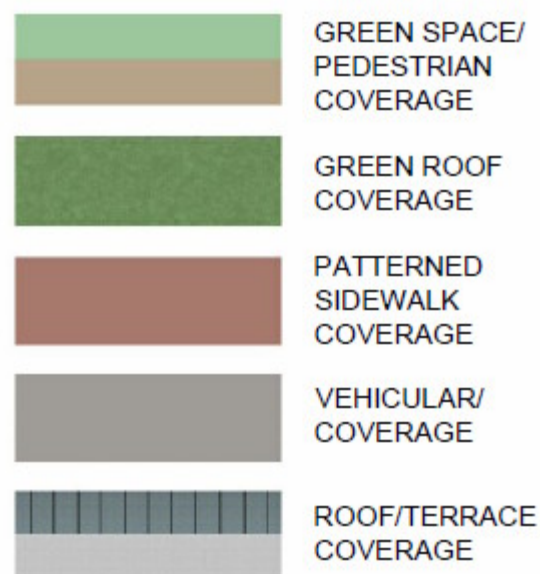


Applicant's green space/[building]coverage exhibit (Exhibit 382(g), diagrams and specifies green space and physical building coverage proposed for the site:



SUMMARY OF GREEN SPACE CALCULATIONS

Gross area including abandonment's prior to dedications:	87,417sf
Green Space requirement: 50% or	43,708.5sf
Coverage calculation is based on the following:	
a. Physical building footprint:	35,220sf
b. Gross vehicular coverage including and parking:	<u>10,279sf</u> 45,499sf
Green Space at grade including pedestrian walkways:	41,918sf
Green Space on roof required to achieve 50% overall Green Space:	<u>1,790.5sf</u>
Sum of Green Space provided to meet minimum Green Space requirement:	43,708.5sf
Green Space proposed on roof:	4,000sf
Green Space proposed at grade:	<u>41,918sf</u>
Sum of Green Space proposed on site:	45,918sf
Green Space coverage ratio: (45,918 / 87,417)	52.0%
Green Space proposed on roof:	4%
Green Space proposed at grade:	48%
Percentage of Required Green Space proposed on roof:	4%
Percentage of Required Green Space proposed at grade:	96%



F. Master Plan and Compatibility

The subject property lies within the Woodmont Triangle District identified in the *1994 Bethesda CBD Sector Plan* (the “1994 Plan”) and is also within the area covered by the *2006 Woodmont Triangle Amendment to the Sector Plan for the Bethesda CBD* (the “Sector Plan”). Because the question of compatibility is interwoven with considerations addressed in the Sector Plan, these matters will be discussed together in this section of the report.

1. Relevant Sector Plan Provisions

The purpose of the Sector Plan was “to reconsider how redevelopment could both provide more opportunities for housing close to the Metro station and retain the qualities and ambience of the small-scale retail that distinguishes the study area from other parts of the Bethesda CBD.” Sector Plan at 1. The Sector Plan explains that the 1994 Plan established four goals for the Woodmont Triangle District (Sector Plan at 2):

- Preserve the predominantly low-density and low-scale character of the district.
- Provide additional housing particularly in the north end of the district.
- Support a diverse specialty retail and restaurant environment to serve the community, including sidewalk cafes and dispersed parking.
- Improve the pedestrian environment with up-graded streetscape including street trees and green open spaces.

The 1994 Plan recommended CBD Zones to further its goals, and promoted a design concept with the greatest building heights closest to the Metro and a step down in heights moving away from the CBD core. *See* Sector Plan at 2. The 1994 Plan recommended maximum building heights below the limits of the zone to address scale, shading and compatibility with neighborhood character. The Sector Plan states that although portions of the Bethesda CBD developed per the 1994 Plan, the Woodmont Triangle District did not, because the building height and density limits inhibited redevelopment. Thus, reconsideration of objectives in the 1994 Plan was warranted.

The study area for the Sector Plan included the entire Woodmont Triangle District from the 1994 Plan, plus the entire Battery Lane District and parts of two other districts. The Sector Plan proposed a vision for the study area of a “vibrant, urban, mixed-use neighborhood that emphasizes residential, small-scale retail, the arts and public amenities.” Sector Plan at 5. Its goals include housing to serve a variety of income levels, small-scale retail, enhanced opportunities for visual and performing arts, and improving the safety and character of existing streets. The Sector Plan reduced the amount of future commercial development in favor of residential development, allowed increased residential floor area ratio (“FAR”) to encourage housing, and removed the 1994 Plan height limits to encourage redevelopment. It also retained the recommendation that building heights should step down moving away from the CBD core and along Norfolk Avenue to preserve access to sunlight, and recommended limited zoning changes to encourage housing.

The Sector Plan supported heights stepping down from the Metro station area to the edges of the CBD, while at the same time encouraging incentives for increased building height to promote housing for all income levels. *See* Sector Plan at 11.

The Sector Plan divided the study area into blocks and provided specific recommendations for each one, both in text and in a table listing recommended zoning and building heights. The subject site is part of Block 19 – the only block for which the table listing “Recommended Zoning by Block” did *not* include a building height recommendation. *See id.* at 22-23. However, a height specification of 35 feet is shown for most of Block 19 on the “Proposed Building Heights” map on page 12 of the Sector Plan. It appears that the area recommended for a 35 foot height limitation in that map extends to cover the northeastern portion of the subject site.

The “Vision Division” of Technical Staff noted that Lots 4, 9 and 11, within the subject site, are within the 35 foot height limit area. Since the Applicant’s proposed setbacks include Lots 9 and 11, there is no violation of the 35-foot height recommendation on those lots; however, Lot 4 is only

partially included in the proposed setback, and the proposed 78-foot tall church/community building intrudes about 19 feet into the 35-foot height limit area. Staff found that the curve of the proposed building reduces the overall mass in this area and that, combined with its setback from the abutting single-family dwelling, results in “compatible relationship.” Page 4 of Attachment 11 to the Staff Report (Exhibit 385).

A 50-foot height limitation is also recommended in the Sector Plan within 60 feet of Old Georgetown Road in the area just southeast of the subject site (*i.e.*, from St. Elmo Avenue to Glenbrook Road) “to maintain compatibility with existing development.” This language was the subject of much contention in both the pre-remand and post-remand proceedings, but it should not have been because the “Proposed Building Heights” map clearly shows that the subject site is outside the area specified for this setback/height recommendation.⁸ *Id* at 11-12.

Most directly relevant to this case is the specific recommendation language for Block 19, which recommends PD zoning at a density of 44 units per acre for the properties along Glenbrook Road and Rugby Avenue currently zoned R-60, including the subject site, “provided that issues of compatibility with existing single-family homes can be addressed.” [Emphasis added.] Sector Plan at 23.

The full recommendation for Block 19, which is comprised of the subject site and the adjacent

⁸ Technical Staff’s Vision Division so indicated in its post-remand memorandum, but noted that compliance with it by Applicant “contributes to the project’s height compatibility with the Sector Plan’s height recommendations.” *See* Page 3 of Attachment 11 to the Staff Report (Exhibit 385). Applicant argues that, regardless of the recommendation’s inapplicability, its revised development plan (Exhibit 417(a)) does comply with this provision. Applicant is correct, but only if the 60 foot setback is counted from the existing curb line, and not from the beginning of the right-of-way, which projects eight feet closer to the proposed building. Tr. 2-22-10 at 152-153. Moreover, if one counts the setback from the proposed right-of-way following the proposed additional dedication along Old Georgetown Road, the proposal would be even further in non-compliance with the inapplicable height/setback recommendation. Because that recommendation is inapplicable, the Hearing Examiner finds it unnecessary to decide whether one should measure this particular setback from the curb or from the right-of-way. Nevertheless, this issue gave rise to a related dispute as to the applicable size of the Old Georgetown Road right-of-way, the resolution of which depends on whether one considers the roadway to be within the CBD or not. Some of the final documents filed in this case (Exhibits 418 and 419) concern an e-mail from Ed Axler of Transportation Planning Staff (Exhibit 417(b)) indicating that that right-of-way should be considered 100 feet wide abutting the subject site. The Hearing Examiner will admit that e-mail over Mr. Brown’s objection; however, it is of very limited relevancy because, in the opinion of the Hearing Examiner, the whole issue of the size of the right-of-way is a “red herring,” given that the Sector Plan’s “60 foot setback/50 foot height” recommendation is clearly inapplicable to the subject site. The real issue is compatibility, and the definitional width of the right-of-way has little practical impact on the compatibility issues related to rezoning.

residential enclave, follows (Sector Plan at 23):

Properties along Rugby Avenue, Glenbrook Road and Old Georgetown Road at the western corner of the Study Area are currently zoned R-60. This Plan recommends PD-44 zoning provided that issues of compatibility with existing single-family homes can be addressed. This would allow near-term redevelopment of an existing church property and possible long-term redevelopment of the single-family detached homes, some of which have been recently renovated. At the time of rezoning, any application should be reviewed to determine compatibility with existing single-family homes, both north and south of Old Georgetown Road. In addition, the rezoning should not be allowed to result in multi-family development surrounding or isolating a limited number of single-family homes. [Emphasis added.]

The Sector Plan also proposed urban design guidelines that recommended designing new buildings so that public streets and spaces retain adequate sunlight, providing sufficient building setbacks to adequately accommodate pedestrians and streetscape improvements, and reviewing new projects for compatibility. *See id.* at 14.

2. Technical Staff and Planning Board Analyses

Technical Staff reviewed the revised development plan on remand and concluded that it proposed a development that would be compatible with adjacent development and in conformance with the Sector Plan. Exhibit 385 at pp. 5 and 12-13.

The Approved and Adopted 2006 Woodmont Triangle Amendment to the Bethesda Sector Plan recommends the PD-44 Zone for the Property. The building height shown on the revised plan (maximum 94 feet) for the new residential building satisfies sector plan recommendations, which lifted the height restrictions included in the Bethesda CBD Sector Plan and replaced them with a 50-foot restriction for a distance extending 60 feet back from the Old Georgetown Road right-of-way. The applicant has noted in the Development Plan that within the 60-foot setback from the existing Old Georgetown Road right-of-way, the new residential construction and the new church/community center will not exceed 50 feet in height. Although the PD-44 zone does not include a height restriction, staff believes that the proposed height is well within the limits of other nearby zoning classifications, such as the CBD-1 optional height limit of 143 feet.

Additionally, the Approved and Adopted (2006) Woodmont Triangle Sector Plan envisions a mixed use urban neighborhood within the Bethesda Central Business District (CBD). The 2006 plan encourages the development of additional housing and community amenities and services. It also provides for additional flexibility in height and density restrictions. Although this site is just outside the CBD, Staff believes that the revised development plan satisfies several goals of the Sector Plan and conforms to the zoning recommendations of

that Plan. The revised development plan provides an opportunity for additional housing, including MPDUs, provides adequate setbacks . . . from neighboring properties and improves the safety, character and attractiveness of existing streets.

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The revised development plan ensures compatibility with adjacent single-family development. . . . [T]he reduction in building mass and density on the site allows for significantly increased setbacks that further improves the compatibility of the proposed buildings with the surrounding neighborhood. Reducing the residential building height (from 114 feet⁹ to 94 feet) further enhances its compatibility.

The revised architectural design of the new buildings has improved the overall design of the site. The upper levels of the eight-story residential building are stepped back, showing 10-foot setbacks for each of the top three floors. The transition of scale achieved by stepping back at the upper levels, along with the 30-foot jog in the Old Georgetown Road setback, reduces the mass of both the residential building and the church/community center, and provides a transition between the neighborhoods and commercial part of the CBD. The proposed landscape elements help to identify the transition between the street edge and the garden courtyards of the project. Additional landscaping is integrated into the project by increasing the building setback significantly from the residences to the north and east and by providing a green roof and an open area for residents. A 10-foot landscape buffer will be provided between the proposed play area and the adjacent residences located northeast of the site. Primary access to the residential building will be from Old Georgetown Road. The entrance/exit of the below grade garage parking adjacent to the church/community center is accessed off of Glenbrook Road. The loading dock has been moved from Glenbrook Road near Lot 5 to the opposite side of the proposed residential building which is adjacent to the Bethesda Chevy-Chase Rescue Station.

The church/community center building as shown on the revised development plan is setback 47.7 feet from the residence on Lot 5. This residence is adjacent to the proposed entry driveway off of Glenbrook Road, however, the driveway descends in grade below the level of the residential property, and an existing fence and proposed landscaping provides privacy and compatibility. This will both reduce acoustic disruptions and help extend the landscape edge of the residential neighborhood into the side yard of the proposed building.

Staff believes that with the increased setbacks and at-grade green area, the reduction in floor area, the reduction in height and building coverage, the building articulation and the creation of a large, pedestrian open area, development of the site would be more compatible with surrounding, land uses than under the original development plan.

⁹ As previously, noted the height of the pre-remand proposal was 106 feet, as measured under the Zoning Ordinance. Because it sits on an 8-foot terrace, Technical Staff listed it as 114 feet tall. The post-remand building also would sit on the 8-foot terrace, but would have a defined height of 94 feet, 12 feet shorter than the original proposal, not 20 feet shorter.

A 3 to 1 majority of the Planning Board agreed with Technical Staff's analysis, as reflected in the Board's remand memorandum of February 19, 2010 (Exhibit 392):

The Planning Board recommends approval of the rezoning application in that the revised application is consistent with the purpose clause and all applicable standards for the PD-44 zone; the revised development plan is compatible with existing and proposed uses in the surrounding area; the PD-44 zone conforms to the recommendations of the 2006 Woodmont Triangle Amendment to the Bethesda CBD Sector Plan; and the Forest Conservation Plan provides for the required minimum levels of afforestation on site-through use of tree canopy.

The Board expressed the position that the revised development plan ensures compatibility with adjacent single-family development by providing increased setbacks, reducing the height and mass of the proposed buildings, and providing open space within the proposed development. With regards to compatibility issues with houses along Old Georgetown Road, the Board stated that improved design elements of the proposed buildings, particularly the façade along Old Georgetown Road, can be more effectively addressed at the site plan review stage.

Commissioner Presley, the Board member opposing the motion, expressed concern that the revised development plan is not compatible. Specifically, Commissioner Presley is concerned that staff examined the revised development plan in comparison to the prior development plan instead of addressing compatibility issues. She believes that the revised development plan includes significant bulk and mass.

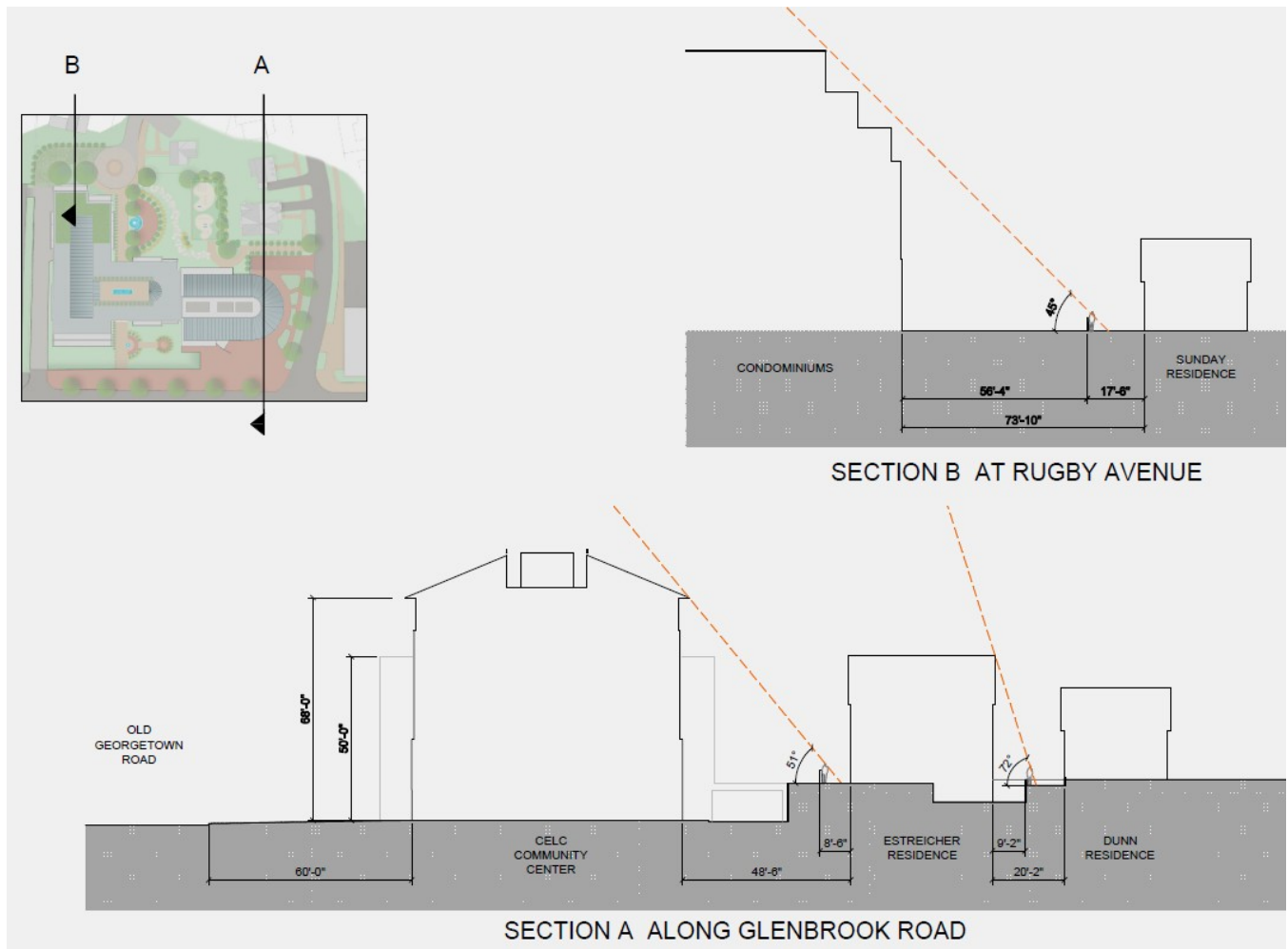
3. Applicant's Analysis

Applicant's architect, Michael Foster, testified on remand to the compatibility of the revised proposal with its surroundings and its suitability for the PD-44 Zone. Tr. 2-22-10 at 18-77.

Mr. Foster argued that the proposed new buildings would allow for a broad combination of multi-family residential, as well as church education and worship functions in a way envisioned by the PD-44 Zone. Tr. 2-22-10 at 19. In his view, the recommended PD-44 zoning envisioned a combination of single-family and multi-family buildings in the area, in a context of apartment buildings with 10 to 12 stories and the nearby CBD, which has taller commercial buildings and recently approved residential buildings.

He noted that the proposed building would be set back 40 feet from the side lot line of the closest home (the Estreicher residence) and 142 feet from its rear lot line, as well as 105 feet from the closest lot

line of the Wash residence. He also stressed the compatibility of the “bulk plane angle,” as shown on Exhibit 382(l), which is reproduced below:



Mr. Foster explained that the bulk plane angle is the angle of measurement from the plane of the property line to the bulk of the building. He noted that between two typical houses on Glenbrook, the angle looking up is about 72 degrees. Lowering the buildings proposed on the subject site and pushing them farther away reduces the bulk plane angle to 51 degrees, mitigating the impact of the building’s bulk. Tr. 2-22-10 at 21, 23. In the case of the Sunday residence, the bulk plane angle is shown at 45 degrees, which Mr. Foster described as a much more suburban model than the angles typically found in this urban setting. *See id.* at 22.

Mr. Foster observed that the side yards proposed here between the subject property and the nearest houses, at 40, 56, 105 and 142 feet, respectively, are “exponentially larger” than the eight-foot to 12-foot side yards typical in a comparable residential neighborhood. *See id.* at 21. He further stated that this was done without crowding Old Georgetown Road, by breaking up the plane of the buildings and setting the middle section back by 40 feet. As a result, with the building setback, the 100-foot street right-of-way and two yards with a minimum of 50 feet, the setback between properties across Old Georgetown Road is 200 feet. *See id.* at 21-22.

Addressing building features, Mr. Foster stated that the church/community center building would have an apse shape, expressing the shape of the worship activities going on in the building. It would open onto a large civic plaza. Its impact on nearby residences would be reduced by the stepping back the height of the top two stories (above the fifth floor) so the building has tapered edges and soft shoulders. *See id.* at 38. He noted that the height of the residential building has been calculated per the definition in the Zoning Ordinance, which measures height from the level of any existing terrace. *See id.* at 41. Mr. Foster noted that the 10 to 12-foot retaining wall that currently separates the church property from the sidewalk would be removed and replaced with a sloping area of grass and other landscaping. In his view, this would be more compatible with the surrounding area than a “foreboding” wall. *Id.* at 44.

Mr. Foster completed his direct testimony by opining that the proposed reclassification is compatible with the surrounding neighborhoods on both sides of Old Georgetown Road, that the proposed development would have no detrimental impacts as compared to the existing conditions, and that the proposed development would be consistent with the general welfare of the community and the residents of Montgomery County. *See id.* at 45-46.

Mr. Foster disagreed with the suggestion that from across Old Georgetown Road, the proposed multi-family building would appear 102 feet tall, rather than 94. He stated that across the 200-foot distance of between the proposed buildings and the houses across the street, the human eye cannot see a

level plane, but sees things from a ground plane. Based on the height to distance ratio, the bulk plane angle from across the street is very small, less than 30 degrees. In Mr. Foster's view, the neighborhood across the street currently looks at a three-story institutional building, setback from the street. With the proposed development, those residents would look at a five-story institutional building, with two stories stepped back, and set back farther. He finds no compatibility difference between the current and proposed buildings. *See id.* at 57. He added that the church entrance has a setback of about 70 feet, creating a civic plaza. Those features, Mr. Foster opined, break down the visual impact of the two buildings so they really look like three separated structures. *See id.* at 75-76.

Applicant's land planner, Phil Perrine, also testified on remand that the proposed development, as revised, would substantially comply with the Sector Plan and would be compatible with surrounding development. Tr. 2-22-10 at 86-188. He noted that setbacks proposed from the adjacent houses are 56 feet from lot 8, 105 feet from lot 10, 142 feet from the rear of lot 5 and 40 feet from the side of lot 5. The plan shows a large public open area at the corner of Glenbrook and Old Georgetown Roads, with a sidewalk area ranging from 49 to 60 feet wide off of Old Georgetown Road. The plan proposes two separate buildings, located in three sections – a west section of the residential building that is set back 52 feet from Old Georgetown Road; an east section of the residential building with a 77-foot setback; and the church/community center building, which has a setback ranging from 49 to 60 feet. The church/community center building has a semi-circular face towards Glenbrook Road, while the residential building presents a more rectangular face towards Old Georgetown Road. The residential building is proposed at 94 feet in height, or 102 feet above the curb of Old Georgetown Road. The church/community center building is proposed at 78 feet in height. Both of the buildings would be lower than existing buildings on nearby Battery Lane, as well as the high-rise across Glenbrook Road from the subject site. The proposed plan includes a walkway, which will be available to the public, between Rugby Avenue and Glenbrook Road.

Mr. Perrine noted the Sector Plan's desire to include housing opportunities within Woodmont Triangle. While the Sector Plan recommended stepping down heights from the Metro station to the edges of the CBD, it also provided incentives for increased building heights to encourage new housing opportunities at all income levels. *See* Tr. 2-22-10 at 89-90, citing Sector Plan at 11. In Mr. Perrine's view, the Sector Plan's recommendation for a building height limit of 50 feet within the first 60 feet off of Old Georgetown Road does not apply to the subject property – it stops at the property's southern edge. *See id.* at 90. He pointed out that although the 35-foot height limit recommended in the Sector Plan for Block 19 appears to include some of the church property, the Sector Plan (page 11) describes its height limits as guidelines.

Mr. Perrine remarked on language from Attachment 11 to the Staff Report noting that the Sector Plan recommendation of a 50-foot building height for a setback of 60 feet before increasing to the full height did not apply to the subject site, but that Applicant's proposal to include it in its development improved compatibility with the Sector Plan. *See* Tr. 2-22-10 at 91-92. Mr. Perrine agreed that this setback is not actually required for the subject property, and with Staff's finding regarding Sector Plan compatibility. *See id.* at 92.

Mr. Perrine also cited findings in Attachment 11 to the Staff Report (page four, second full paragraph):

- The mass and shape of the proposed building contribute to the project's compatibility with the community, including the houses to the north.
- The church/community center building is curved, reducing the overall mass and scale of the building.
- The proposed setback of the church/community center building is 40 feet to the property line of the closest Glenbrook Road dwelling. The setback area at the rear of the multi-family building, which includes open space and a play area, establishes a compatible relationship with the single-family dwelling to the immediate north.
- The project's building heights are sufficiently compatible with the houses north of Old Georgetown Road.

Mr. Perrine noted that the Sector Plan recommended the subject property for the PD-44 Zone, which does not have a height limit, and in which one would expect some height above 35 feet. In Mr. Perrine's view, a 35-foot height limit is not consistent with a recommendation for the PD-44 Zone. *See id.* at 94-95. He does not believe the intent was to try and ensure compatibility with the neighboring homes by keeping a 35-foot height limit on the areas closest to those homes.

Mr. Perrine agreed with Technical Staff's finding (Attachment 11, page four, last paragraph) that the height of the proposed buildings is compatible with the single-family dwellings to the immediate south, across Old Georgetown Road. *See id.* at 100. He noted Staff's observations that the height of the building is distributed to improve its compatibility, that the buildings are proposed at a height of 50 feet for the portions closest to Old Georgetown Road and that Old Georgetown Road is 100 feet wide. Mr. Perrine also observed, with regard to the Sector Plan's recommendation for a step-down in heights from the metro station to the edges of the planning area, that there is an existing ten-story building on Battery Lane and an 11-story building across Glenbrook Road from the subject property on Old Georgetown Road. He stated that if the 11-story building were to be replaced, the Sector Plan's height recommendation would permit a building there up to 110 feet in height (assuming 15 percent MPDUs, resulting in a density bonus). *See id.* at 102.

Mr. Perrine pointed out that the proposed buildings would sit either on the footprint of an existing building or within existing surface parking area. *See id.* at 106-107. As a result, the green area shown on the ground is very comparable to the existing green area on the ground. He also emphasized that the sense of bulk and massing is reduced by dividing the project into two separate buildings with three separate sections.

In Mr. Perrine's view, the proposed development would be compatible with nearby residential dwellings on both sides of Old Georgetown Road, and would not surround or isolate the 20 homes remaining on Glenbrook Road and Rugby Avenue. *See id.* at 108. He noted that the Battery Park

neighborhood for years has been separated from the Glenbrook and Rugby residences by institutional uses – the church and the fire and rescue squad. The proposed development would not change that, nor would it change the access for residents on Glenbrook and Rugby to the park located just north of the subject site near the intersection of Glenbrook and Rugby and to the CBD. *See id.* at 108.

Mr. Perrine opined that the proposed development would be consistent with the Sector Plan's recommendation that building heights should step down from the Metro area to the edges of the planning area, even if you ignore the ten-story building across Glenbrook from the subject site. *See id.* at 158. He acknowledged that currently, except for that one building, the buildings nearby on Old Georgetown Road are lower in height than what is proposed in this application. Mr. Perrine stressed the Sector Plan's height recommendations, which call for buildings up to 110 feet in height on Glenbrook Road just south of the subject site, just inside the CBD boundary. *See id.* at 159.

Mr. Perrine summarized the bases for his finding that the proposed development is consistent with the Sector Plan and compatible with the surrounding area thus (*Id.* at 108-112):

- 50-foot building height for the first 60 feet from the curb of Old Georgetown Road, even though that recommendation does not technically apply.
- Two separate buildings with three separate sections.
- Generous open space to the north, more than twice the size of an R-60 lot.
- Loading area off the Old Georgetown Road driveway, away from abutting residences.
- Face of building toward Rugby Avenue is only 75 feet wide, with a very generous setback before the next section of building face.
- Large open area at the intersection of Glenbrook and Old Georgetown, with a semi-circular building façade facing Glenbrook.
- Building heights step down from 11 stories across Glenbrook, ten stories on Battery Lane, and taller buildings closer to the Metro station.
- 110-foot building height limit recommended in Sector Plan for site of existing 11-story building across Glenbrook.
- Residential building steps back in height on the upper three floors.
- 100-foot width of Old Georgetown Road creates a one-to-one relationship between distance to residences and building height.

Applicant's counsel, Stephen Kaufman, argued in closing (*See* Tr. 2-23-10 at 118-133) that "the main issue" is compatibility; however, given the urban and transitional nature and texture of the area, the standard is whether it meets the purpose clause of the zone, and "it doesn't necessarily have to be the most

compatible , nor does it have to be the most . . . complimentary use or set of uses.” *Id.* at 118. Mr. Kaufman later emphasized this point, “It doesn’t have to be the most ideally compatible use.” *Id.* at 126.

Although the opposition observed that the project would be more compatible as a purely residential use with less bulk and shorter buildings, Applicant’s counsel argued that the Council intended that the church be given “the most opportunity possible” to remain in its place and to have an additional residential component so that it could continue and expand its mission. Applicant buttressed this argument with an October 19, 2005 memorandum from Technical Staff to Marlene Michaelson, Senior Legislative Analyst for the Council, regarding the Woodmont Triangle Sector Plan Amendment then under consideration. Exhibit 417(i), second memorandum. The first paragraph, on the page numbered circle 7, indicates that “the existing church would like the opportunity to develop housing for the elderly or high-rise housing on their existing property and retain the church.”

Ms. Michaelson referenced the Technical Staff memorandum in her memorandum dated October 20, 2005, to the “PHED” Committee.¹⁰ Exhibit 417(i), first memorandum. Thus, the Council (or at least its staff and Council members on the PHED committee) was aware of Applicant’s desired use of the property for both church and residential purposes when it adopted the Sector Plan amendment with a recommendation for the PD-44 Zone on the site. An e-mail from former Councilmember Steve Silverman, dated November 29, 2005, appears to indicate that the Council expected the church would be able to continue providing services to the community, but it is not clear whether Mr. Silverman was suggesting that these services would be provided on the site. Exhibit 417(j).

Applicant’s counsel argued that the current project responds very effectively to the criticisms of the original project, and it is in the public interest because it serves the general needs of the area and fits in with the transitional nature of the area. He suggested that Technical Staff recommended the PD-44 Zone because the height limit in the R-10 Zone in the Battery Lane area is 110 feet., and the PD-44 Zone

¹⁰ The “PHED” Committee is short for the Planning, Housing and Economic Development Committee of the Council.

would be within that context. Mr. Kaufman argued that the proposal would do exactly what the Master Plan called for in providing housing for all income levels and encouraging revitalization and redevelopment.

According to Applicant's counsel, the visage of the development on Old Georgetown Road is not monolithic because it is broken up and there is a setback. He noted that Technical Staff and the Planning Board found the setbacks on all sides to be compatible.

Following the hearing, Applicant responded to the opposition argument that the compatibility provisions of Zoning Ordinance §59-C-7.15(b) applied to this case and effectively prohibited the design of the proposed development because of its required setbacks. For clarity, Applicant's response will be addressed after the discussion of the opposition argument in the next section of this report.

4. Opposition's Analysis

The opposition in this case offered no new expert testimony in the post-remand proceedings, but they placed continued reliance on the pre-remand testimony of their expert in land planning, Kenneth Doggett. Post-remand lay testimony was provided by Steven Teitelbaum of the Battery Park Citizen's Association, Jim Humphrey of the Montgomery County Civic Federation and Herbert Estreicher, an abutting land owner. Mr. Estreicher and the "Concerned Residents of Glenbrook Road and Rugby Avenue" were represented by attorney David Brown.

Stephen Teitelbaum is a resident of the Battery Park community, which confronts the subject site across Old Georgetown Road. He is also a member of the Battery Park Citizens Association (BPCA) and its immediate past president. He testified at the remand hearing on his own behalf and on behalf of the BPCA. Tr. 2-22-10 at 260-275.

In addition to his testimony, Mr. Teitelbaum offered into the record a three-page resolution adopted by BPCA in opposition to the present project. *See Ex. 400.*

Mr. Teitelbaum argued that the standard for this rezoning is not whether the Applicant has done its best, but whether the proposed development is compatible with single-family residences on both sides of Old Georgetown Road and does not isolate any residences. The question is also not whether the present proposal is more compatible than the first one, just whether it is compatible.

Mr. Teitelbaum argued that as seen from Battery Park, minor changes in materials, window treatments and height do not solve the threshold compatibility problem, they “only evidence how truly impoverished the original proposal was.” *Id.* at 264. He stated that the Battery Park Citizen’s Association does not consider the present proposal compatible with the residential character of Battery Park, and in fact considers it worse than the original plan. Mr. Teitelbaum described the present proposal, in which each building has a larger gross square footage than the entire gross square footage presently on the site, as an attempt to extend the Bethesda CBD by one more block into a residential neighborhood. In his view, the scale, scope and use of this proposal are out of keeping with nearby buildings, except for the eleven-story building across Glenbrook Road from the subject site, which is actually within the CBD. He called it an “architectural white elephant” that would not be permitted there today. Mr. Teitelbaum feels that one planning mistake does not justify another one. *Id.* at 265-266.

Mr. Teitelbaum argued that the present proposal is worse than the first one for two reasons. First, the church and steeple would be demolished, removing a landmark building that, in Mr. Teitelbaum’s view, provides a gateway to the Bethesda CBD while remaining compatible in scale, height and materials with the neighboring residential community. Rather than framing the Bethesda skyline like the steeple currently does, Mr. Teitelbaum argued that the new buildings would block it. *See id.* at 267. Second, he contended, the massing of the new multi-family building has been pushed closer to Old Georgetown Road and Battery Park. Previously, at least the multi-family building wrapped around the church and was partially hidden from Battery Park. Now, Mr. Teitelbaum anticipates a 285-foot-long building at a height of 102 feet (94 feet plus the eight-foot terrace) staring directly at his neighborhood across the street. He

stated that the while the residential building is proposed to be 12 feet lower, the church/community center building is two feet higher, and they will no longer be separated by the church sanctuary, making their visual effect massive. *See id.* at 268. He objects strongly to the idea of a “wall of buildings across the street nearly as high as the current steeple.” *Id.*

Mr. Teitelbaum argued that the proposed project violates the “tenting” principal of the Sector Plan, which calls for decreasing building heights moving from the Metro to the edges of the planning area. He related that the Planning Board said, during its consideration of the matter, that tenting is not necessary on this site because Old Georgetown Road is wide enough to provide a visual separation. *See id.* at 269. Mr. Teitelbaum noted that tenting has been applied along Arlington Road in downtown Bethesda, where it abuts the Edgemoor neighborhood, even though Arlington Road is only one lane narrower than Old Georgetown Road, and even though the Edgemoor neighborhood is shielded from the high-rise side of Arlington by the low-rise library and elementary school, as well as a park along the residential perimeter. Mr. Teitelbaum also questioned whether a private green roof counts toward satisfaction of an open space requirement.

Finally, Mr. Teitelbaum argued that the social goals of the church do not justify approval of the rezoning, and that they could presumably be provided in more modest facilities than those now proposed. *See id.* at 272.

Herbert Estreicher owns and lives in the Glenbrook Road home that abuts the subject property both to the rear and to the side (Lot 5, Block B), as can be seen the revised Development Plan (Exhibit 417(a)). He testified to his continued opposition at the remand hearing. Tr. 2-23-10 at 6-22.

Mr. Estreicher argued that the current Staff Report is entitled to no deference, because the Staff assessed compatibility by comparing the new plan to the old one, rather than by evaluating the new plan on its own merits. He noted Commissioner Presley’s strong dissent on the Planning Board during the remand review, based on lack of compatibility due to the mass, bulk and scale of the project and the

Sector Plan recommendation to protect the neighborhoods on both sides of Old Georgetown Road. He also observed that Commissioner Alfandre had strong reservations about the plan and expected a significant amount of work to take place at site plan to ensure compatibility. He did not say that the plan is compatible, but that it could be compatible.

Mr. Estreicher considers the mass, scale and bulk of the proposed development to horrendous, and out of place in this area. *See id.* at 13.

Mr. Estreicher contends that living in an urban area should not mean that he and his neighbors end up in a valley rimmed by high-rises. He noted that many of the homes on Glenbrook and Rugby are newly built or refurbished, and represent substantial investments for their owners. He does not consider it an acceptable trade-off for living in Bethesda to be hemmed in by a 280-foot monolith. *See id.* at 16. He argued that the proposed plan violates the Sector Plan's tenting principle, given that many of the structures on both sides of Old Georgetown Road to the south, all the way to the Metro, are three and four stories high. *See id.* at 16-17. Mr. Estreicher maintained that the proposed development would also isolate the neighborhoods on both sides of Old Georgetown Road.

Mr. Estreicher suggested that much of the testimony presented by land planning expert Kenneth Doggett during the first hearing, on behalf of the opposition, is still germane.¹¹ *See id.* at 17. He referred to the summary of Mr. Doggett's testimony and findings at pages 120 and 121 in the original Hearing Examiner's Report and Recommendation in this matter, stating that Mr. Doggett talked about a reasonable transition between the single-family homes and a high-rise building; described the Rugby/Glenbrook homes and Battery Park as stable neighborhoods that should not be permitted to deteriorate; argued that a PD-44 development could coexist with the nearby homes if it were done at a different scale; argued that the proposed development would isolate the houses on Rugby and Glenbrook; noted that the existing larger buildings on Battery Lane are well-screened except for the fire station; and

¹¹ Mr. Estreicher stated that the neighbors could not afford to pay experts "to say the same thing over and over" but tried to do something that makes sense by having experts in the first hearing. *See* Tr. 2-23-10 at 17-18.

suggested that without the church and community center, 107 dwelling units could be laid out on the site quite reasonably. *See id.* at 18-19, 20-21. Mr. Estreicher argued that the fact that the opposition did not bring in experts for the second hearing is not grounds for approval.

Addressing the specifics of the new church/community center proposal, Mr. Estreicher conceded that unlike the original proposal, with this plan he would still be able to see the sky from the side of his house. He does not feel that this, by itself, makes the plan compatible. *See id.* at 20.

Jim Humphrey is the Chair of the Montgomery County Civic Federation's Land Use Committee, and he testified in that capacity. Tr. 2-23-10 at 95-113. Mr. Humphrey explained that the Civic Federation's involvement in this case stemmed from its longstanding position in support of compliance with master plans, as well as the language of the Zoning Ordinance. *See* Tr. 2-23-10 at 95.

Mr. Humphrey noted that in order to support approval of the development plan in this case, the District Council must make a finding of substantial compliance with the Sector Plan, and a determination of compatibility with the surrounding neighborhood is key to making that finding. He emphasized that language from the Sector Plan, the PD Zone and the findings necessary to support approval of a development plan all reinforce the need to ensure the compatibility of this project with nearby land uses, citing the following (*see id.* at 96-97):

- One of the purposes of the PD Zone is “to ensure compatibility and coordination of each development with existing and proposed surrounding land uses.”
- The first paragraph of the PD Zone purpose clause states that “It is intended that the planned development zone category be utilized to implement the general plan, the area master plans and other pertinent County policies in a manner and to a degree more closely compatible with said County plans and policies than may be possible under other zoning categories.”
- The Sector Plan includes a specific compatibility recommendation for this site: “At the time of re-zoning, any application should be reviewed to determine compatibility with existing single-family homes, both north and south of Old Georgetown Road.”
- Under Section 59-D-1.61(b) of the Zoning Ordinance, a development plan may be approved only if the District Council finds that the proposed development “would be compatible with adjacent development.”

Mr. Humphrey argued that the proposed development fails to comply with the recommendations of the Sector Plan on three critical points, as discussed below.

1. Failure to show compatibility with the existing single-family homes both north and south of Old Georgetown Road. Mr. Humphrey quoted from the December 2008 Hearing Examiner's report in this case, which found that the original design "would be incompatible with nearby single-family homes due to the height, bulk and setbacks of the proposed buildings." 12/15/08 Hearing Examiner Report, p. 137. He conceded that the current layout has greater setbacks from the nearest Glenbrook and Rugby homes, but stated that compatibility involves more than that. In Mr. Humphrey's view, compatibility is little improved in the revised plan, with the eight-story residential building lowered by 12 feet, but the church/community center building increased in height by two feet. Moreover, the bulk of the proposed buildings is, to him, the factor that renders the redesign even more incompatible with the surrounding neighborhood than the original, especially from the perspective of the homes to the south, across Old Georgetown Road and outside the sector plan area.

Mr. Humphrey observed that the original plan proposed a project that was broken into three elements "spaced out" along Old Georgetown Road, a new community center building, the existing church and a wing of the proposed residential building. This layout, in his view, alleviated the impact of the project's bulk as seen from Old Georgetown Road. He considers the current design to be a single structure, barely perceptible as two buildings, which is 285 feet long and has a height ranging from 102 feet above the street for the residential portion, to 85 feet above the street from the ridge line of the proposed church/community center. Mr. Humphrey maintained that the recessed portion of the residential building does little or nothing to mitigate the visual impact "of the sizeable bulk of this project." Tr. 2-23-10 at 99.

Mr. Humphrey noted that the R-60 Zone allowed a building height of 35 feet to the midpoint of a sloped roof, and then the standard was lowered to 30 feet for newly constructed homes. He stated that

this resulted in an absolute height of about 43 feet to the ridge line of these homes. Thus, the proposed buildings are two or more times the height of nearby homes. Mr. Humphrey also compared building footprint size in the R-60 Zone, which he estimated at about 2,100 square feet (minimum 6,000 square foot lot size times 35% maximum lot coverage) with the footprint of the proposed project, 17 times greater at 35,220 square feet.

2. Failure to comply with the 35-foot height limit recommended in the Sector Plan for the church-owned R-60 lot on the west side of Glenbrook Road, next door to Mr. Estreicher's house. *See id.* at 101-102. Mr. Humphrey finds that this height recommendation is clearly indicated on the Sector Plan's building height map, Sector Plan at 12. He stated that the Civic Federation agrees with Mr. Perrine that this lot was recommended for a 35-foot height limit because of the existing R-60 zoning, but he believes that the 35-foot limit was also intended to apply to the redevelopment of any of the lots for which it was recommended if redeveloped under the PD Zone. He sees the 35-foot height recommendation as reinforcing the Sector Plan's call for a compatibility finding in the event of a rezoning. *See id.* at 102.

3. Inconsistency with the Sector Plan's general recommendations for building heights decreasing from the CBD towards the residential edge, as stated in the Hearing Examiner's pre-remand report. Mr. Humphrey maintains that the Sector Plan not only calls for a step-down in height but assigns a 35-foot height limit for all properties on the residential edge in the sector plan area, except for four specific locations. *See id.* at 103.

Mr. Humphrey stressed that the Sector Plan's guidance should be given great weight, not rationalized away, particularly in light of the language in the PD Zone stating that its purpose include implementing master plans more closely than is possible under other zoning categories. He quoted the December 2008 Hearing Examiner's report in this case, which stated that the homes on the south side of Old Georgetown Road "would face a high density development of massive, tightly spaced buildings that would completely block the view of the residential enclave behind them, severing the connection between

the two residential areas,” and would “loom over the homes on Glenbrook Road and Rugby Avenue and would bring the height and density of the CBD past its borders right out to the edge of the Battery [Park] neighborhood.” *See id.* at 104. Mr. Humphrey considers these findings equally applicable to the present proposal. *See id.* at 105-106.

Mr. Humphrey stated that the Civic Federation supports religious institutions and appreciates this church’s outreach activities, but stressed that finding the proposed use would be in the public interest must be in addition to the finding that it would be compatible, not instead. Mr. Humphrey contended that the proposed plan is still trying to fit all of the church-related uses proposed originally onto the site, as well as 122 percent of the residential density recommended in the Sector Plan. He considers this simply too much for the space. *See id.* at 109. Squeezed onto the site as originally proposed it was incompatible with adjacent homes to the north; squeezed the other way it is incompatible with homes across Old Georgetown Road.

Mr. Brown summarized the opposition case in his testimony before the Planning Board on remand (Exhibit 388(b)): Mr. Brown criticizes the Technical Staff report, accusing Staff of assessing compatibility primarily by the degree to which the revised project reflects improvements over an earlier iteration which had been rejected by the Council. In his opinion, Staff failed to adequately address the “planning perspective,” and this project “does not come close to being the right plan for the Property.” *Id* at p. 2.

Mr. Brown quoted the pre-remand finding by former Hearing Examiner Carrier of lack of compatibility because of the size, bulk and locations of the new construction proposed for this site. He noted that “improvements from ‘incompatible’ mean ‘less incompatible;’ they do not necessarily translate to ‘compatible,’ and “[i]n any case, ‘relative compatibility’ as between successive proposals is not the statutory standard for evaluation.” *Id* at p. 4.

Mr. Brown pointed out that both the pre- and post-remand projects called for the same number of dwelling units, and thus the same density of development.

According to Mr. Brown, the truly relevant and meaningful before-and-after comparison is missing from the Staff report. This is the one that assesses the impact of the Project in relation to the status quo. The applicant envisions razing all the existing structures on the Property as well as most of the mature trees and other vegetation. The gross floor area of all the existing structures is not reported by Staff, but appears to be in the vicinity of 35,000 square feet.¹² They are to be replaced with 228,000 square feet of new floor space. This appears to be about a seven-fold increase in development of this currently R-60 zoned Property

Mr. Brown noted that the Sector Plan recommended approval of the PD-44 Zone “provided that issues of compatibility with existing single-family houses can be addressed.” He also noted that in the PD-44 zone, housing is a permitted use; a church/community center is only a discretionary service use under §59-C-7.133(b) that may or may not be permitted by the District Council, depending on a finding of neighborhood compatibility.

Mr. Brown also raised height/setback issues which have been previously discussed, and noted that the Revised Development Plan, Staff Report Attachment 5, shows the height of the church/community center, which is partially on Lot 4, to be 78 feet. In other words, the height of the church/community center is over twice the 2006 Sector Plan limit of 35 feet on Lot 4. This, Mr. Brown argues, is not “substantial compliance” with the Sector Plan. “In fact, this Sector Plan violation makes the Project materially out of compliance with respect to the most significant problem faced by every iteration of the Project – compatibility with adjacent single family residences.” *Id* at p. 7. Mr. Brown also set forth his argument that the proposal does not comply with either the purpose of the PD-44 Zone or its development standards.

¹² In his Planning Board testimony, Mr. Brown had indicated that the present site contained 30,000 square feet; he later corrected that figure.

Although Mr. Brown argued to the Planning Board that Section 59-C-7.15(b) of the Zoning Ordinance provides a yardstick for evaluating compatibility with nearby single-family detached homes (*Id* at pp. 10-11), for the first time during closing argument at the public hearing on February 23, 2010, he argued that this section is directly applicable to the subject property because it “adjoins land for which the area master plan recommends a one-family detached zone.” 2-23-10 Tr. 143-146. Applicant vigorously disagreed with this assertion (Exhibit 417(f)), and the Hearing Examiner will address the issue at this point.

Section 59-C-7.15(b) provides:

(b) In order to assist in accomplishing compatibility for sites that are not within, or in close proximity to a central business district or transit station development area, the following requirements apply where a planned development zone adjoins land for which the area master plan recommends a one-family detached zone:

(1) No building other than a one-family detached residence can be constructed within 100 feet of such adjoining land; and

(2) No building can be constructed to a height greater than its distance from such adjoining land. [Emphasis added.]

The applicable rule of statutory construction was set forth by the Maryland Court of Appeals in *Trembow v. Schonfeld*, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006),

Our goal is to ascertain and implement the legislative intent, and, if that intent is clear from the language of the statute, giving that language its plain and ordinary meaning, we need go no further. We do not stretch the language used by the Legislature in order to create an ambiguity where none would otherwise exist. If there is some ambiguity in the language of the statute, either inherently or in a particular application, we may then resort to other indicia to determine the likely legislative intent. [Citations omitted.]

As former Hearing Examiner Carrier concluded in her pre-remand report (at page 142), the subject site is in close proximity to a CBD, and thus the above limitations do not apply to this application. The current Hearing Examiner agrees with that conclusion and hereby adopts it. The language of the statute is very clear, specific and unambiguous. It only applies this provision to “*sites that are not within, or in close proximity to a central business district or transit station development area.*” The subject site clearly does not fall within that category, since it sits directly across Glenbrook

Road from the Bethesda CBD. The Supreme Court decision in *District of Columbia v. Heller*, 128 S.Ct. 2783(2008), cited by opposition counsel, is inapposite. The purpose of the clause under scrutiny here is unambiguous, while the purpose of the Second Amendment clause interpreted in *Heller* was demonstrably ambiguous.¹³

This conclusion, of course, does not mean that the PD-44 Zone does not require compatibility. As Applicant's counsel concedes, the requirements of Zoning Ordinance §59-C-7.15(a) still apply, and those terms expressly require that a proposed development "*be compatible with the other uses proposed for the planned development and with other uses existing or proposed adjacent to or in the vicinity of the area. . . .*"

Having summarized the critical arguments on both sides, we now turn to the Hearing Examiner's own analysis of the remand proposal.

5. Hearing Examiner's Analysis

Before launching into the Hearing Examiner's analysis of the remand case, there are two threshold issues which must be addressed. Both concern the appropriate treatment of the pre-remand record.

The first issue is whether to consider pre-remand testimony and exhibits in evaluating the post-remand proposal. Both sides seem to agree that the post-remand proposal must stand on its own,¹⁴ but both sides also rely on portions of the pre-remand record to support their post-remand positions.¹⁵ Former Hearing Examiner Carrier ruled at the post-remand hearing that the pre-remand exhibits and

¹³ Given the Hearing Examiner's ruling based on statutory interpretation, it is unnecessary to reach the argument in Applicant's reply (Exhibit 417(f)) that the Sector Plan recommends PD-44, which is not a one-family detached zone, and therefore the provision is also factually inapplicable. If the Hearing Examiner did address this issue, he is less than certain of the outcome (although former Hearing Examiner Carrier agreed with Applicant's position on this point). The text of the Sector Plan does recommend the PD-44 Zone, but the Plan also retains R-60 as a base zone, as noted by the opposition. Since the homes abutting the subject site will remain in the R-60 Zone, the answer to this issue is less clear than the statutory interpretation question resolved above.

¹⁴ See, e.g., Tr. 2-23-10 at 7 and 118.

¹⁵ See, e.g., Applicant's list of pre-remand exhibits with continuing relevancy (Exhibit 391(a)) and Opposition Counsel's reliance on the pre-remand testimony of architectural expert, Kenneth Doggett. Tr. 2-23-10 at 133-134.

testimony would remain in the record, but she would consider only those portions which continued to have relevance. Tr. 2-23-10 at 4-5. Neither side objected to this very reasonable position, and this Hearing Examiner adopts it with regard to this report.

The second issue is whether any weight should be given to the findings and conclusions of former Hearing Examiner Carrier in her pre-remand report. The doctrine of administrative *res judicata*¹⁶ precludes re-examination in a later proceeding of issues earlier decided in the same case by an administrative body acting in a quasi-judicial capacity, absent good cause (*e.g.*, fraud, surprise, mistake, inadvertence or a new or different factual situation). *See, Schultze v. Montgomery County Planning Board*, 230 Md. 76, 185 A.2d 502 (1962) and *Woodlawn Area Citizens Assoc. v. Board of County Comm'rs*, 241 Md. 187, 194-197, 216 A.2d 149 (1966). In this case, we certainly have a changed factual situation (*i.e.*, a revised development plan); however, the argument has been made by the opposition that some of Ms. Carrier's findings were made based on facts which have not changed, or if anything, have changed in a way that has made the findings even more strongly supportable.

The most striking example of this argument is the point made by opposition witnesses Jim Humphrey of the Civic Federation, citing to various findings of incompatibility by former Hearing Examiner Carrier, and arguing that some of Applicant's changes have actually made matters worse, especially for the people who live in the confronting homes of Battery Park. Tr. 2-23-10 at 95-113.

In addition, the District Council's remand order of February 3, 2009 (Resolution No. 16-838) sent the case back to the Hearing Examiner with the express direction "to reopen the record to permit the Applicant to amend its development plan consistent with the findings of the Hearing Examiner in LMA G-864 regarding compatibility with the master plan, the purposes and standards of Zone PD-44,

¹⁶ Some courts have noted that the term "*res judicata*" technically does not apply to administrative proceedings; rather, an administrative body may not change its position arbitrarily, and in the absence of a showing of fraud, surprise, mistake, inadvertence or a new or different factual situation, a change in a finding of the administrative body may be arbitrary. As stated in *Gaywood Community Asso. v. Metropolitan Transit Authority*, 246 Md. 93, 100, 227 A.2d 735, 739 (1967), "While the action of an administrative agency reversing itself or a predecessor agency may resemble *res judicata*, it is not, as the cases show, the same as the final decision of a proceeding on its merits by a court of competent jurisdiction."

and the surrounding neighborhood.” [Emphasis added.] Thus, part of the mission of the Hearing Examiner on remand is to determine whether the Applicant has submitted a revised plan “consistent with the findings . . . regarding compatibility” contained in the pre-remand report of former the Hearing Examiner Carrier.

Thus, in order to avoid arbitrary changes in the previous findings and to comply with the remand order, the Hearing Examiner must give weight to the prior findings of incompatibility, except to the extent the underlying facts have changed in a way which has eliminated or reduced that incompatibility.

We will thus begin with Ms. Carrier’s findings. As noted by Mr. Humphrey, Ms. Carrier found that the original design “would be incompatible with nearby single-family homes due to the height, bulk and setbacks of the proposed buildings.” 12/15/08 Hearing Examiner Report, p. 137. He also quoted the statement in the December 2008 Hearing Examiner’s report that the homes on the south side of Old Georgetown Road “would face a high-density development of massive, tightly spaced buildings that would completely block the view of the residential enclave behind them, severing the connection between the two residential areas,” (12/15/08 Hearing Examiner Report, p. 51) and would “loom over the homes on Glenbrook Road and Rugby Avenue and would bring the height and density of the CBD past its borders right out to the edge of the Battery [Park] neighborhood.” (12/15/08 Hearing Examiner Report, p. 51) 10-23-10 Tr. at 104. Mr. Humphrey considers these findings equally applicable to the present proposal. *See id.* at 105-106.

Looking first to the homes along Rugby and Glenbrook, it is clear that the changes made by Applicant have significantly improved the compatibility situation by vastly increasing the setbacks from adjoining lots and by a reduction in the height of the residential building and the overall building coverage. The changes in setbacks, heights, floor areas and building coverage are set forth in a table in the Technical Staff report (Exhibit 385, pp. 4-5), which is reproduced on the next page:

<i>Standard</i>	<i>Previous Plan</i>	<i>Revised Plan</i>	<i>% Change</i>
Setback			
---Rear Ch/Comm. Center to Lot 5	11.5 feet	40 feet	248% increase
---Side, Residential Bldg. to Lot 5 and Lot 6	20 feet	142 feet	610% increase
---Rear, Residential Bldg. to Lot 10	15 feet	105 feet	600% increase
---Rear, Residential Bldg. to Lot 8	57.6 feet	54.6 feet ¹⁷	2% decrease
Height			
---Residential Bldg.	106 feet ¹⁸	94 feet	11.3% reduction
---Ch/Comm. Ctr.	76 feet	78 feet	2.5% increase
Floor Area			
---Residential Bldg.	188,884 sq. ft.	175,000 sq. ft.	7.4% reduction
---Ch/Comm. Ctr.	64,314 sq. ft.	53,000 sq. ft.	17.6% reduction
Building Coverage	41,882 sq. ft.	35,220 sq. ft.	15.8% reduction

As stated by Technical Staff (Exhibit 385, p. 4),

The increased setbacks create a large open space with a landscaped park/garden, including a fenced playground area for the daycare and a pedestrian path to allow citizens to walk through the church property from Rugby Road [*sic*] to Glenbrook and Old Georgetown Roads. Furthermore, as a result of the new design of integrating the church and community center into a single structure, the loading dock has been moved from Glenbrook Road near Lot 5 to the opposite side of the proposed residential building which is adjacent to the Bethesda Chevy-Chase Rescue Station. . . .

The Glenbrook Road façade of the church/community has been revised and now includes a semi-circular shape in order to provide open space at the northwest quadrant of Old Georgetown Road and Glenbrook Road. While points of access to public roads remain the same, parking spaces near Rugby Avenue have been removed and replaced with a landscape buffer area near a single-family residence (Lot 8).

These changes are not insignificant, and do reduce the impact of the proposed buildings on nearby homes on Glenbrook and Rugby, as demonstrated by Applicant's "bulk plane angle," study (Exhibit 382(l), reproduced on page 34 of this report) and by common sense.

¹⁷ Mr. Perrine indicated that the setback from the residential building to Lot 8 would be 56 feet, not 54 feet. Tr. 2-22-10 at 87.

¹⁸ Mr. Foster testified that since the site has an eight-foot terrace, the 114-foot height listed for the pre-remand proposal by Technical Staff should have been listed as 106 feet, which would be the height under the definition of building height in the Zoning Ordinance. See Tr. 2-22-10 at 55. The height of the building is now 94 feet per the Zoning Ordinance definition, 12 feet lower than the previous version. The Hearing Examiner has corrected the figures in the above Table.

On the other hand, Mr. Brown is quite correct in observing, as he did in his Planning Board testimony, that improvements in a state of incompatibility do not necessarily translate into a state of compatibility, and “[i]n any case, ‘relative compatibility’ as between successive proposals is not the statutory standard for evaluation.” Exhibit 388(b) at p. 4. The proposed two buildings are still very bulky structures to be placed next to some single-family detached homes and across Old Georgetown Road from others. While the proposed buildings may not be out of place in the general context of all the buildings in the surrounding area, as shown in Applicant’s building contexts simulations (Exhibits 382(h) and (i)) reproduced on page 19 of this report), the Hearing Examiner found it helpful, in analyzing compatibility in this case, to view the portion of Applicant’s building context simulations showing the immediate area around the subject site.



Viewed in this immediate context, it is easy to see that the proposed buildings will still dwarf the nearby single-family detached homes, in spite of the reduced height of the residential building and the significant increase in setbacks.

The same is true of the visage from across Old Georgetown Road:

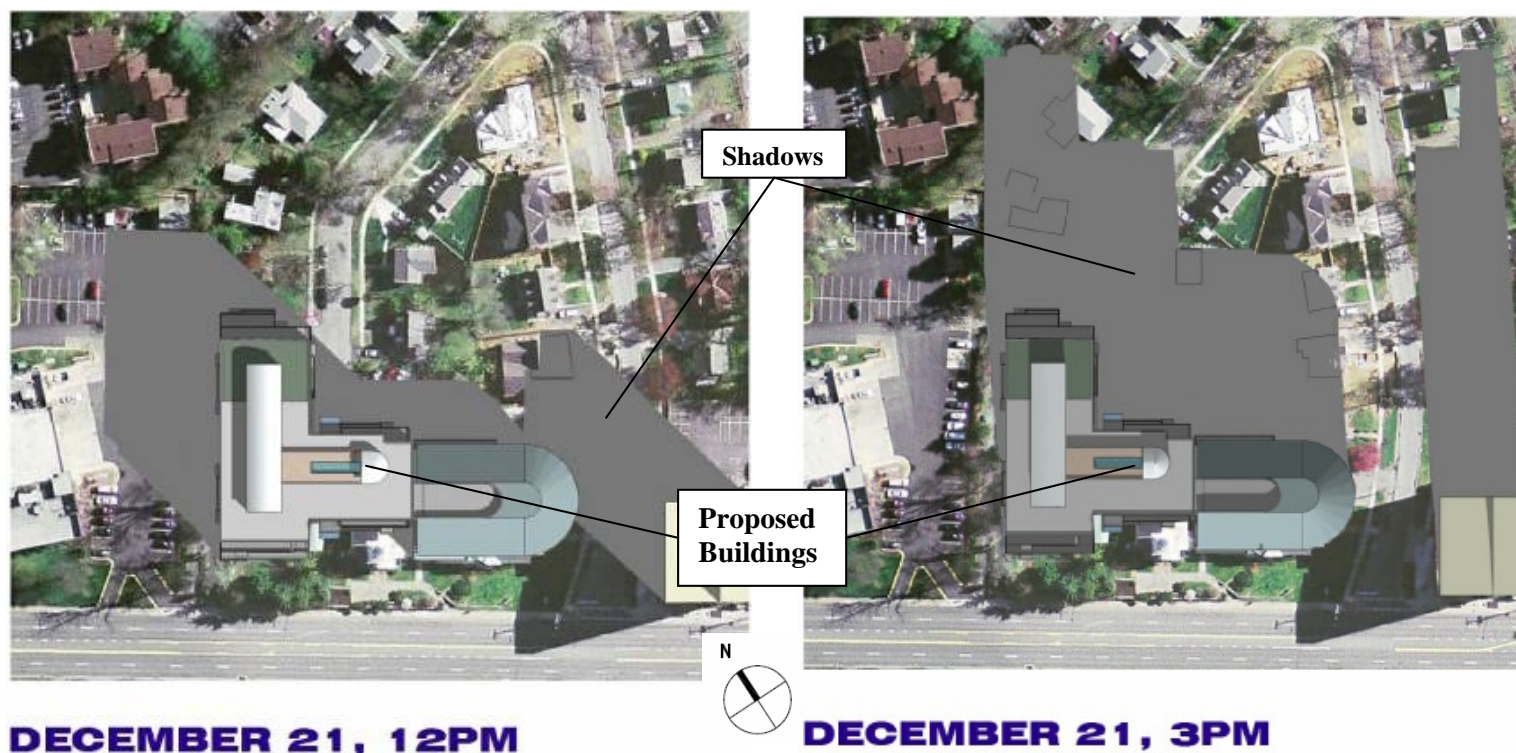


Exhibit 382(h), View from Old Georgetown Road

While the proposed buildings may be compatible in the overall context of the surrounding area, they are not compatible with the neighborhood immediately adjacent to their location, as demonstrated by the immediate area portion of Applicant's own building context simulations. The compatibility question is not just a question of the overall building context in the surrounding area; it is also, and perhaps most importantly, a question of harmony with the immediate neighbors. Admittedly, one of those immediate neighbors is the eleven-story building across Glenbrook from the subject site, but it must be remembered that that building, whatever one thinks of it, is actually within the Bethesda CBD,

while the subject site and abutting homes are not.¹⁹

The Hearing Examiner's conclusion is reinforced by additional evidence, including one of Applicant's own shadow studies, Exhibit 382(o). That study shows that by December 21, at noon, a shadow from the proposed buildings will begin to cover single-family lots to the northeast, and by 3 p.m., will cover much of the adjacent area to the east.



Although, no study simulations depict the hours between noon and 3 p.m., the shadows in question must necessarily creep onto those single-family homes as the afternoon progresses.

While shadows will not be a problem for the single-family homes across Old Georgetown Road, they will continue to “face a high-density development of massive, tightly spaced buildings that would completely block the view of the residential enclave behind them, severing the connection between the

¹⁹ The Bethesda CBD Sector Plan Study Area extends beyond the actual area of the CBD itself, as can be seen from the Sector Plan Area Map on page 18 of the 1994 Bethesda Sector Plan. Similarly, the Woodmont Triangle Study Area shown on page 4 of the 2006 Woodmont Triangle Amendment, is the northwestern part of the Bethesda CBD Sector Plan Study Area, and it includes an area that is outside of the CBD. Thus, the subject site and the single-family, detached homes on Rugby and Glenbrook, though within the study area, are outside of the CBD, as shown on page 13 of this report.

two residential areas,” 12/15/08 Hearing Examiner Report, p. 51. Ms. Carrier went on to say:

The new buildings would provide a stark contrast to nearby single-family neighborhoods, rather than an appropriate transition between the residential edge and the CBD. These negative impacts cannot be justified by the fact that there is a non-conforming, 11-story building on the corner of Glenbrook Road. One tall, out-of-place building should not justify building more, which would only make the situation worse.

The Hearing Examiner agrees with the assessment of the Battery Park Citizens Association, as expressed in its resolution of January 13, 2010 (Exhibit 400), that the revised plans have exacerbated compatibility problems vis-à-vis the Battery Park neighborhood across Old Georgetown Road to the southwest of the site, by pushing the mass closer to the roadway in an effort to improve compatibility with adjoining properties. This negative result is apparent from comparing the pre-remand simulations on page 17 of this report with the post-remand simulations on page 18 of this report. The view along Old Georgetown Road went from being broken up by the retained church steeple to a rather monolithic appearance of the newly proposed buildings. As stated by Mr. Teitelbaum, rather than framing the Bethesda skyline like the steeple currently does, the new buildings would block it. 2/22/10 Tr. at 266-267. Previously, the multi-family building wrapped around the church and was partially hidden from Battery Park. Now, Mr. Teitelbaum anticipates a 285-foot-long building at a height of 102 feet (94 feet plus the eight-foot terrace) staring directly at his neighborhood across the street. Applicant’s architect admitted on cross-examination that there would be no physical separation between the two buildings, as seen from the outside. There is architectural differentiation, but the two buildings are joined by a common firewall. Tr. 2-22-10 at 67.

Mr. Teitelbaum and Mr. Humphrey also argued that the proposed plan violates the Sector Plan’s tenting principle, given that many of the structures on both sides of Old Georgetown Road to the south, all the way to the Metro, are three and four stories high. The Hearing Examiner agrees with this observation, since the subject property sits just outside the CBD, yet it would be taller than many of the buildings within the CBD, and much taller than the adjacent and confronting single-family homes.

The Hearing Examiner is even more concerned about the apparent violation of the 35 foot height limit for Lot 4 (part of the subject site) shown on the Sector Plan's height map, a portion of which is reproduced below. Sector Plan, p. 12.



As previously discussed, the "Vision Division" of Technical Staff noted that Lots 4, 9 and 11, within the subject site, are within the 35 foot height limit area. Since the Applicant's proposed setbacks

include Lots 9 and 11, there is no violation of the 35-foot height recommendation on those lots; however, Lot 4 is only partially included in the proposed setback, and the proposed 78-foot tall church/community building intrudes about 19 feet into the 35-foot height limit area. Page 4 of Attachment 11 to the Staff Report (Exhibit 385).

Although Staff nevertheless found compatibility, the Hearing Examiner finds it difficult to conclude that a building more than twice the height of the recommended limit is in substantial compliance with the Sector Plan, which is what the PD-44 Zone requires. This is especially true here, given the emphasis in the Sector Plan on compatibility with the single-family homes near the subject site. The PD-44 Zone recommendation was expressly conditioned upon satisfying this proviso: “provided that issues of compatibility with existing single-family homes can be addressed.” Sector Plan at 23. The following language was also included:

. . . At the time of rezoning, any application should be reviewed to determine compatibility with existing single-family homes, both north and south of Old Georgetown Road. In addition, the rezoning should not be allowed to result in multi-family development surrounding or isolating a limited number of single-family homes.

While Applicant’s evidence, discussed on page 40 of this report, shows that the Council was (or should have been) aware of the church’s desire to remain on the site, in combination with new residential development, that does not lead the Hearing Examiner to conclude that the Council, in approving the 2006 Sector Plan, intended for the combined project to proceed at the proposed density, combining church with community center and 107 dwelling units, no matter what its impact on its neighbors. On the contrary, compatibility with the existing single-family homes was clearly a key aspect to the Sector Plan’s PD-44 recommendation. That appears to require either a smaller number of residential units or a smaller church/community building, or both.

The Hearing Examiner was also struck by the comments of two Planning Board Commissioners during the remand proceedings, and later, by Applicant’s own attorney. Commissioner Pressley stated (2/18/10 Remand proceeding before the Planning Board, Exhibit 419(a), pp. 77-78) :

In reading through it, and going through what's required of the PD-44, I find that the bulk, the massing, the height, the setback issues, that all of those are incompatible and don't fulfill the requirements of the sector plan relative to this specific area. They in fact, in my opinion, simply extend the CBD and for that reason, I would disagree [with the Chair's comments indicating approval of the proposal].

Commissioner Alfandre, though he voted to recommend approval, stated (2/18/10 Remand proceeding before the Planning Board, Exhibit 419(a), pp. 77-78):

I don't know yet. That was fast. Mr. Kaufman, I think you hit it right on the head when you said is the PD-44 the right zone, it's not. It's not your fault. It's not the church's fault. And you have had to react in a very narrow range to adjacent compatibility issues. To me this is the tail wagging the dog, and unfortunately now, you know, it may end up being a better project for you. I don't know. To me it seems like it's not as good a project, but you have responded to what you've been asked to respond to, and I think our staff has done the best that they can do. That doesn't mean that I don't have problems with it, I do. . . .

I will say though that facade as the Chairman said, needs a tremendous amount of work and I would like to see some distinction between the entrance of the church and the office building and you know, at a later date.

I think this is the best we're going to do here.

I don't mean to denigrate, you know I really don't. Because it's not a perfect product as you can see. . . .

Applicant's own counsel, Steve Kaufman, questions the propriety of the PD-44 Zone and makes what could be characterized as a tepid (or very candid) defense on the issue of compatibility: He stated that the proposal "doesn't necessarily have to be the most compatible, nor does it have to be the most . . . complimentary use or set of uses." *See* Tr. 2-23-10 at 118. Mr. Kaufman later emphasized this point, "It doesn't have to be the most ideally compatible use." *Id.* at 126.

Mr. Kaufman is right, to this extent; we should not, as is often said, let the perfect be the enemy of the good. However, the Hearing Examiner cannot find that the current proposal represents "the good" when it comes to the nearby single-family detached homes on both sides of Old Georgetown Road. Although there have been improvements in design, the density of this project remains unchanged, and its bulk remains massive for a site this size. Too much is being crammed into too little space, given the nearby single-family homes. As Ms. Carrier said in her report, "The new buildings

proposed for this site are too big [and] too cramped on the site . . .” Pre-Remand Hearing Examiner’s report , p. 50. That conclusion remains valid, even though the proposal has been revised.

The proposed development would further the Sector Plan’s goals of providing additional housing and improving the pedestrian environment. It would also be consistent with the plan’s specific recommendation for PD-44 zoning on the subject site, and redevelopment of the church property. It would not, however, be consistent with some of the Sector Plan’s height recommendations for this property or its emphasis on compatibility with nearby single-family homes.

Having carefully weighed the evidence, the Hearing Examiner finds that the preponderance of the evidence supports a conclusion that the proposed development does not substantially comply with the goals and recommendations of the Sector Plan, in terms of both height and compatibility. Substantial compliance with the Sector Plan is required to support approval of the Development Plan under § 59-D-1.61(a), as well as to make a finding of compliance with the PD Zone. The Sector Plan plays a central role in the purpose clause for the PD Zone, so in this context its recommendations and objectives are entitled to particular deference. In the Hearing Examiner’s view, substantial compliance means compliance with the essential elements of the plan. In this case, the Sector Plan is quite recent, dating from March 2006, so the details of the plan retain their original significance and may reasonably be considered essential elements.

Although continuing the church’s good works would certainly be in the public interest, as would the provision of moderately priced housing, the Hearing Examiner agrees with Ms. Carrier’s observation that consistency with the public interest must be demonstrated in addition to compatibility, not instead of it. 12/15/08 Pre-remand Hearing Examiner’s report, p. 49. The issues at stake in this application concern the impact of the proposed rezoning and development, not the impact of the church’s services to the community.

The Hearing Examiner is not persuaded, moreover, that the development currently proposed for

this site is necessary to allow the church to achieve its stated goals of continuing and expanding its activities at this location. As land planner Kenneth Doggett suggested, it would be possible to redevelop this site in a way that is compatible with the surrounding area, including nearby single-family homes, if the development were done at a smaller scale; however, as Ms. Carrier observed, “it [is] very unlikely that anything short of a dramatic decrease in density would achieve a compatible result.” 12/15/08 Pre-remand Hearing Examiner’s report, p. 50. The revised plan, although it combined the church building with the community center, did not reduce the proposed density of the residential building by even one unit.

G. Public Facilities

Under the County’s Adequate Public Facilities Ordinance (County Code §50-35(k)), an assessment must be made by the Planning Board as to whether the transportation infrastructure, schools, water and sewage facilities, police, fire and health services will be adequate to support the proposed development, and whether the proposed development will adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process. The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that the County Council sets in the Growth Policy.

In addition, Zoning Ordinance §59-H-2.4(f) requires the re-zoning Applicant to provide sufficient information to demonstrate a reasonable probability that available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application is submitted. Thus, both the Planning Board and the Council play a role regarding the evaluation of the adequacy of public facilities.

While the final test under the APFO is carried out at subdivision, the District Council must first make its own public facilities evaluation in a rezoning case, because the Council bears the responsibility

of determining whether the reclassification would be compatible with the surrounding area and would serve the public interest. We turn first to transportation facilities.

1. Transportation: Roadway Capacity

In the present case, the facts that bear on the adequacy transportation facilities have not changed significantly since the pre-remand evidence because Applicant is still seeking to construct a 107 unit residence and maintain a church and community center. Applicant's transportation planner, Michael Lenhart, testified that the proposal on remand is no different from a traffic perspective: same land uses, same quantities, same trip generation. Mr. Lenhart confirmed his opinion that the level of transportation services is adequate and would be so with the proposed development, "well within the adequacy standards." *See* Tr. 2-22-10 at 245. Therefore, the discussion of this topic is reproduced from the December 15, 2008 Hearing Examiner's report:

Pursuant to Section 59-H-2.4(f), the sufficiency of roadway capacity has been analyzed in the present case under the standards of the 2003-05 AGP Policy Element, which was in effect when the application was filed. Under the 2003-05 AGP Policy Element, subdivision applications are subject to only one transportation test, Local Area Transportation Review ("LATR").²⁰ The Planning Board recognizes its LATR Guidelines as the standard to be used by Applicant in the preparation of reports to the Hearing Examiner for zoning cases. LATR Guidelines at 1. LATR involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion at nearby intersections during the peak hours of the morning and evening peak periods (6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.). The analysis involves making calculations related to the number of conflicting

²⁰ *See* 2003-05 AGP Policy Element at 6-7; *Local Area Transportation Review Guidelines Approved and Adopted July 2004* ("LATR Guidelines") at 1. The Hearing Examiner hereby takes official notice of the LATR Guidelines. It should be noted that since the first hearing in this case, the County has adopted a new Policy Area Mobility Review test, known as PAMR. In the Bethesda policy area, PAMR requires mitigation of 30 percent of a project's traffic impacts by making non-roadway transportation improvements. In this case, the Applicant can achieve nearly all its mitigation by contributing to the Bethesda parking district organization (a contribution it would be required to make even without PAMR due to the location

vehicular movements (e.g., through movements and left turns) that go through an intersection in the space of an hour, taking into account existing traffic counts, traffic anticipated from projects that have been approved but not yet built (“background” traffic), and traffic projected from the proposed development. These calculations result in a “critical lane volume,” or CLV, for the intersection. If the CLV exceeds the threshold that the County Council established in the Growth Policy for the applicable policy area, the developer must make roadway improvements that are projected to allow traffic to move more freely, reducing the CLV to a level below the threshold.

The Applicant performed a traffic study as required in this case.²¹ Technical Staff directed the Applicant to study the effects of the proposed development on CLVs at six nearby intersections: Old Georgetown Road at Battery Lane, Glenbrook Road, Auburn Avenue and the existing site access point; and Glenbrook Road at Rugby Avenue and the existing site access point. *See* Ex. 264(a). Technical Staff identified no approved development projects nearby, and therefore no background traffic was added to the traffic counts. *See id.*, Appendix A.

Applicant’s traffic engineers expect the proposed residential building and the expansion of the child day care center to generate a total of 51 new trips during the weekday morning peak hour and 55 new trips during the weekday evening peak hour. *See* Ex. 264(b), at Rev’d 12. These estimates are for “new” trips added to the roadway network, not counting the trips currently generated by existing activities on the site, including the existing day care center. Applicant’s traffic engineers did not factor into the estimated trip generation the larger community center and associated activities because they anticipate that the church will be able to schedule most of those activities to have minimal traffic impact during the peak traffic hours. *See* Tr. Sept. 9 at 7-8. The Hearing Examiner greets this with some skepticism, particularly with regard to the 4:00 to 7:00 p.m. period, when many after-school activities

of the subject property within the Bethesda CBD policy area). The Applicant will be required to mitigate two more trips if the project goes forward. *See* Tr. 2-22-10. at 251.

²¹ The traffic study was originally prepared in November 2006. It was updated in March 2007, and corrections were issued for certain figures in May and June 2007. *See* Exs. 34, 264(a), 264(b) and 264(c).

might be ending and evening activities beginning. However, as noted below, the CLV numbers are so much lower than the applicable CLV thresholds that it would take an enormous number of additional trips to make any difference in the LATR analysis.

The traffic study concluded, and Technical Staff agreed, that with the proposed development, CLVs at all of the studied intersections would be well below the applicable thresholds of 1,600 and 1,800. See Ex. 264(c), Ex. 7; Staff Report at 10. The highest CLV calculated was 1,323 at Old Georgetown Road and Battery Lane, several hundred critical movements below the threshold where a detrimental impact is expected. At the intersections of Glenbrook Road with Rugby Avenue and the site entrance, projected CLVs are less than 170 in both the morning and the afternoon, suggesting low levels of traffic. Accordingly, the proposed development satisfies LATR requirements.

2. Transportation: Access, Circulation and Parking

The development plan in this case shows three access points to the proposed development, Old Georgetown Road, Glenbrook Road and Rugby Avenue; however, there was considerable confusion at the remand hearing regarding the use of the Rugby Avenue access point. See Tr. 2-22-10 at 246-249. To clear up that confusion, Applicant added Binding Element #9 to the development plan, after the hearing, which provides, “Except for emergency vehicles, no direct vehicular access from Rugby Road [*sic*] is permitted through the property.” Exhibit 417(a). Moreover, Mr. Lenhart testified that even with a Rugby Avenue access point, there would be very little traffic using it during the peak hours. See *id.* at 247. He feels it would have a de minimis impact on Rugby Avenue. Mr. Lenhart opined that without a Rugby Avenue entrance, traffic would use the Glenbrook Road entrance. See *id.* at 249.

Vehicular access from Old Georgetown Road and Glenbrook Road did not change after the remand (although the loading dock was moved from the Glenbrook Road area to the driveway on the northern end of the site, adjacent to the Bethesda Chevy-Chase Rescue Squad). The access from Old Georgetown Road would be at the same location as the existing driveway, with a new driveway leading

to the garage entrance on the north side of the development. Access to the garage is also proposed from Glenbrook Road.

Applicant's architect, Michael Foster, testified on remand that a relatively small site like this typically has only one parking and loading entrance, but this plan proposes two points of access: a Glenbrook Road driveway to serve as the primary access for church/community center visitors, and an Old Georgetown Road alley entrance, as the primary residential entry point. This, he observed, allows a conflict-free flow for day care center drop-off and pick-up as well as a separate, unobstructed traffic flow for residents of the multi-family building. Tr. 2-22-10 at 23-28. He noted that the day-center itself has to have ground level space for emergency access.

Applicant's civil engineer, Edward Wallington, submitted a Fire Department Access Plan, Exhibit 407, which was first prepared at the time of the original application or shortly thereafter to reach a conceptual agreement with Fire and Rescue Department staff for emergency access. *See* Tr. 2-23-10 at 86. The exhibit demonstrates how a fire truck could get to the site and leave without having to make multiple turns, recognizing that the turning radius of the Rugby Avenue cul-de-sac is too small for a fire truck. The route identified involves using a through movement from Rugby Avenue to Old Georgetown Road, starting from the cul-de-sac on Rugby and driving over the grass pavers to the driveway that extends to Old Georgetown. *See id.* at 87. The original drawing was then updated to reflect the revised development plan, but the concept that Fire and Rescue Staff found acceptable a year ago has not changed. *See id.* at 87-88. The drawing also shows that the fire truck could come down Glenbrook and turn into the site driveway if it needed to reach that part of the site.

Technical Staff reviewed the parking proposed for the site, and agreed with Applicant that Zoning Ordinance Chapter 59-E requires 215 off-street parking spaces, as set forth in the Technical Staff report (Exhibit 385, p. 11) reproduced on the following page:

Residential:

<i>17 MPDU @ 1 sp/u</i>	<i>= 17 spaces</i>
<i>21 1-bedroom @ 1.25</i>	<i>= 27 spaces</i>
<i>59 2-bedroom @ 1.5</i>	<i>= 89 spaces</i>
<i>10 3-bedroom @ 2</i>	<i>= <u>20 spaces</u></i>
	<i>= 153 spaces required</i>

Non-Residential Uses:

<i>Church/Community Center</i>	
<i>248 seats @ 1 sp/4 seats</i>	<i>= 62 spaces required</i>

Total spaces required: = 215 spaces

As noted by Technical Staff, and shown on the development plan (Exhibit 417(a)), a total of 236 parking spaces are provided in the structured parking garage. Thus, the number of planned parking spaces is consistent with Chapter 59-E. Other issues raised in the pre-remand hearing regarding parking and circulation will be addressed during site plan review if rezoning is approved.

Former Hearing Examiner Carrier determined in her pre-remand report of December 15, 2008, that the proposed development would not be incompatible with the surrounding area due to traffic or parking, and that the proposed access and circulation patterns would be safe, adequate and efficient. There has been no evidence presented during the post-remand process that would serve to change that conclusion, given that the volume of the proposed use has remained unchanged. The Hearing Examiner therefore adopts Ms. Carrier's conclusion on this point.

3. Water and Sewer

Former Hearing Examiner Carrier determined in her pre-remand report of December 15, 2008, that the subject property is in Water Service Category W-1 and Sewer Service Category S-1, and will continue to be served by existing water and sewer lines. Mr. Wallington testified that nothing in the revised plan affects his prior opinion that the project would be adequately served by public facilities including roads, sewer, water and utilities. *See* Tr. 2-22-10. at 218-19. There has been no evidence

presented during the post-remand process that would serve to change Ms. Carrier's finding, and the Hearing Examiner therefore adopts Ms. Carrier's conclusion on this point.

4. Schools

The subject property is in the Bethesda Elementary School, Westland Middle School and Bethesda-Chevy Chase High School service areas. *See* Ex. 112. Based on 107 dwelling units and average yield factors derived from a 2005 M-NCPPC survey, Montgomery County Public Schools ("MCPS"), prior to the remand, projected the proposed development to generate approximately five elementary, five middle and four high school students. *See* Ex. 112. Since the post-remand proposal also calls for 107 dwelling units, these projections should still be reliable.

Former Hearing Examiner Carrier noted in her pre-remand report of December 15, 2008, that as measured by MCPS program capacity, enrollment at Bethesda Elementary School exceeds capacity and is projected to exceed capacity in the future; enrollment at Westland Middle School exceeds capacity but an addition was scheduled to open in August 2008; and enrollment at Bethesda-Chevy Chase High School exceeds capacity, but an addition was scheduled to open in August 2009.

The Planning Board is required under the Growth Policy to determine, for each fiscal year, whether each school cluster has adequate capacity under the Growth Policy test to permit approval of additional subdivisions. The results of the Planning Board's school capacity evaluation for Fiscal Year 2009 indicated that eight school clusters, including the Bethesda-Chevy Chase cluster, exceeded 105 percent of program capacity at the elementary level. As a result, any subdivisions approved during FY 2009 in the Bethesda-Chevy Chase cluster would have been required to make a school facilities payment. The record does not indicate whether the Bethesda-Chevy Chase cluster would have passed the applicable test under the Growth Policy in effect when these applications were filed. Ms. Carrier noted that while case law permits the District Council to deny a rezoning based on even minor increases in school overcrowding, in light of the small number of students the proposed development is expected to

generate, she did not consider denial to be justified on this basis. *See* Pre-remand Hearing Examiner's Report of December 15, 2008, pp. 58-59.

On December 1, 2009, the Council approved Resolution No. 16-1201, adding funding to the FY 09-14 Capital Improvements Program to allow construction of classrooms in the Bethesda-Chevy Chase High School Cluster, in order to bring it out of moratorium. Exhibit 378(r). Moreover, Applicant's land planner, Phil Perrine, testified following the remand that the Planning Board, on January 14, 2010, approved a recommendation from Technical Staff for mid-cycle fiscal year 2010 school test results, to bring the Bethesda-Chevy Chase and Seneca Valley clusters out of moratorium. *See* Tr. 2-22-10 at 123-124 and Exhibit 382(f).

Given this additional evidence and Ms. Carrier's observation about the small number of students expected to be generated, the Hearing Examiner finds it reasonably probable that available public school facilities and services will be adequate to serve the proposed development if it is approved for rezoning (although school facilities payments will likely still be required).

H. Environmental Issues and Storm Water Management

The subject site is not located in an area with special environmental protections, nor does it have natural features of any significance. Technical Staff indicated that the proposed development is subject to the Forest Conservation Law, and Applicant has provided a revised Preliminary Forest Conservation Plan (PFCP).

Environmental Planning Staff found the proposed preliminary forest conservation plan to be in compliance with the forest conservation law, and recommends the granting of "tree variances" to allow the removal of two existing specimen trees which are in poor condition.. *See* Attachment 10 to the Remand Staff Report (Exhibit 385). A forest conservation requirement of 15 percent of on-site afforestation must be provided for a planned development application, and the Planning Board noted that the revised PFCP shows the 15 percent afforestation requirement to be met on-site with canopy

coverage credit. Exhibit 392, p. 2.

Environmental Planning Staff also noted that traffic noise impacts to the proposed residential use, and possible noise impacts from the proposed use on adjoining properties, will be mitigated as part of subsequent reviews. The Applicant will be required to demonstrate compliance with the M-NCPPC Noise Guidelines and the Montgomery County Noise Ordinance during subsequent reviews, if rezoning is approved.

Turning to stormwater management, Applicant's civil engineer, Edward Wallington, testified that the new stormwater management regulations adopted by the State of Maryland will require updating of the stormwater management concept plan that was approved some time ago. *See* Tr. 2-22-10 at 211.

Mr. Wallington described the State's new approach, which focuses on "environmental site design," a process that tries to capture run-off close to the source and get it into the ground as soon as possible, or to treat it and slow down the release rate. The idea, he explained, is not to allow storm-water to collect in large quantities and high velocities, but to keep it in small volumes with lower velocities. This typically involves smaller stormwater management facilities such as biofilters, swales, green roofs and pervious paving, rather than large underground storage facilities.

The previous plan for the subject property involved three or four underground vaults with controlled rates of release. Mr. Wallington anticipates that the new plan will center on a green roof, porous pavers, stone trenches and at least one biofilter in the green area. *See id.* at 213-215 and Applicant's Environmental Site Design Exhibit (Exhibit 398). A biofilter is a depressed planting area that water drains into, where the water is filtered and slowly released through under-drains into the storm drain system. It serves as both a stormwater management facility and an aesthetic feature.

Mr. Wallington is positive that the subject site can satisfy the new stormwater management requirements, to the extent they had been defined at the time of the hearing. *See id.* at 216. Mr.

Wallington opined that none of the anticipated stormwater management features would have any impact on the site layout. *See id* at 218.

Technical Staff also noted that the stormwater management concept will be subject to the state's new stormwater management standards, requiring environmental site design (ESD) to the maximum extent practicable. Staff supports deferral of the formal stormwater management concept approval to later reviews. Remand Staff Report (Exhibit 385, p. 3). Based on this record, the Hearing Examiner finds no evidence of environmental concerns that cannot be adequately addressed in the normal site plan and subdivision review process.

I. Community Participation

The application enjoys substantial support from church members, as well as from various non-profit groups that provide community services in the Bethesda area, some of them operating out of the church's existing community building. Supporters argue that the rezoning should be approved to allow the church to continue its mission at its current location, including providing important social services to needy Bethesda-area residents. Almost all of the written and testimonial support from the community was received prior to the remand. Following the remand, one community witness, Melanie Folstad of Chevy Chase, testified in support of the project based on the services it will provide. Tr. 2-22-10 at 279-283. There were also two letters of support, one a fax from Sally Kaplan of Bethesda Cares, Inc. (Exhibit 389) and the other an e-mail Ginanne M. Italiano, of the Bethesda-Chevy Chase Chamber of Commerce (Exhibit 390).

The application is opposed by immediate neighbors from Glenbrook Road and Rugby Avenue and by residents of Battery Park, the neighborhood confronting the subject site across Old Georgetown Road. It is also strongly opposed by the Montgomery County Civic Federation and several other local residents who wrote pre-remand letters in opposition.

The Battery Park Citizens Association (BPCA) formally opposed the proposed development on remand by resolution (Exhibit 400), and by the testimony of Stephen Teitelbaum, its past president. Tr. 2-22-10 at 260-275. The Committee of Concerned Residents of Glenbrook Road and Rugby Avenue, also continued its strong opposition on remand through the testimony of Herbert Estreicher, an abutting land owner (Tr. 2-23-10 at 6-22), and through the representation of attorney David Brown.

Mr. Brown had called expert witnesses as well as community witnesses at the pre-remand hearings, but there were no opposition experts called at the post-remand hearings. Nevertheless, the opposition continued to rely on the pre-remand expert testimony of its land planner, Kenneth Doggett. Tr. 2-23-10 at 133-134.

Jim Humphrey of the Montgomery County Civic Federation testified in opposition both before and after the remand, the latter testimony reflected in a written submission (Exhibit 408) as well as in the hearing transcript. *See* Tr. 2-23-10 at 95-113.

Both the pre- and post-remand testimony from the community is summarized in the Part IV of this report, and where relevant, referenced in the discussion of compatibility and Master Plan compliance contained in Part III.F. of this report. It is therefore unnecessary to repeat it here.

Former Hearing Examiner Carrier ruled, at the post-remand hearing, that pre-remand testimony and exhibits would remain in the record, and would be considered to the extent of their continued relevance. Tr. 2-23-10 at 4-5. Therefore, for ease of reference, the summary of pre-remand community participation contained in the December 15, 2008 pre-remand Hearing Examiner's report is reproduced in full below.

Summary of Pre-Remand Community Input from Pre-Remand Hearing Examiner's Report:

Representatives of two non-profit organizations that serve low-income residents of Montgomery County (Bethesda Cares and Interfaith Works) testified in support of the proposed development, arguing that the re-zoning should be permitted to allow the church to continue and expand its work as

part of the County's network of social service providers. A representative of the Washington Smart Growth Alliance testified that her organization recognizes the proposed development as a "Smart Growth" development, due to its urban location, proximity to transit, density, pedestrian-friendly streetscape and support for the church's provision of social services. The testimony of each of these witnesses is summarized in Part IV below.

Seven community members testified in opposition to the proposed development. Four are residents of Glenbrook Road; two are Battery Park residents and the current and former presidents of its citizen's association, although the association did not take a formal position in this case; and one, Jim Humphrey, represented the Civic Federation. Their testimony, which is summarized in detail in Part IV below, presented the view that the size, bulk and location of the proposed buildings would be incompatible with nearby single-family homes, both those on Glenbrook Road and Rugby Avenue and those across Old Georgetown Road. Some witnesses contended that the proposed development would also be incompatible due to its traffic impacts on the quiet, residential Glenbrook Road and Rugby Avenue, and the oddly-shaped, unsignalized, five-way intersection between Glenbrook, Rugby and Norfolk Avenue. Mr. Humphrey's contentions that the proposed development would be inconsistent with the Sector Plan are addressed in Part III.F above.

The record contains approximately 140 letters in support of the proposed rezoning from church members and other supporters of the church. Many of these letters follow the pattern of one of several form letters. The individualized letters are summarized first, followed by each of the form letters.

Individualized Letters in Support

The church's senior pastor of 24 years, Marvin Tollefson, wrote that he has observed many changes and community transitions, and the need for support services in Bethesda has never been greater than now. *See* Ex. 215. He described the delivery of human services as near and dear to the people of the church, which provides services including family therapy, senior day care, child day care,

performing arts, a homeless lunch program, a 12-step and support group program, a place for ethnic congregations to worship, public environmental forums, Toys for Tots, backpacks for the homeless, cell phone collections for abused women, refuge for Katrina victims and more. Reverend Tollefson stated that the proposed redevelopment is consistent with pressing community needs in Bethesda, and noted that the church has devoted considerable resources since 2000 to analyzing plans that would allow it to remain and serve the Woodmont Triangle community.

Reverend Tollefson wrote that while the church has served the community faithfully since 1934, a small number of its neighbors have now “elected to minimize the long standing, visible commitment that Christ Lutheran has made to the community” by raising objections, such as increased traffic congestion and building shadows. He stated that the church has made changes to address these concerns and will continue to work with the local community on more changes. Reverend Tollefson urges decision makers to factor in the “positive, daily social impact” of the church on the quality of life in Montgomery County, rather than judging this matter on a strictly technical basis, noting that the Planning Board has given its unanimous support. See Ex. 215.

Patricia Tollefson wrote a similar letter, noting the church’s services are provided without regard to religious affiliation, and that the church has been an asset to the community since the 1930s. See Ex. 219.

Community Ministry of Montgomery County reports that the church is part of the CMMC, a 35-year-old interfaith coalition of 140 congregations working together to meet the needs of the poor in Montgomery County, and is an important service provider. See Ex. 137. CMMC considers the proposed development to be thoughtful and responsive to the community’s needs, and notes the Planning Board’s unanimous support. “It is always troubling when neighbors reject what is beneficial for the greater good. We hope that the Church’s many grateful neighbors outnumber its challengers and welcome the social services that the church provides for many years to come.” Ex. 137.

Lutheran Social Services of the National Capital Area (“LSS”) wrote that it has worked with community organizations throughout the Washington metropolitan area for 90 years to promote self-sufficiency, social justice and the inherent worth of each human being, and that the church in this case has been an important partner. See Ex. 236. LSS considers the proposed redevelopment plan responsive to the needs of the community, thoroughly considered and well developed.

Bethesda Cares, Inc. has served lunch to the homeless out of the church’s social hall for 18 years. See Ex. 91. Bethesda Cares supports the proposed redevelopment because it would help broaden and strengthen the church’s mission to provide community services to the Bethesda community, and would create affordable housing units.

Mi Refugio, Inc., wrote that through its endowment fund, the church in this case has partnered with Mi Refugio over a number of years to provide education, food and clothing to needy children. See Ex. 214. Mi Refugio described the church as a vibrant and responsible member of the Bethesda community for more than 70 years, noting that the proposed development would allow its services to be expanded and create affordable housing units. The letter requests favorable consideration of the present application, despite the “technical objections” raised by neighbors.

The Nonprofit Centers Network, a national network of community-based nonprofit facilities, described the church’s proposed development as a cutting-edge strategy to bring organizations together under one roof, improving the ability of non-profits to collaborate in providing the highest quality service to their clients. See Ex. 187. The letter stated that centers like the one proposed in this case bring tremendous benefits to their communities, providing meeting places for people to come together and build relationships and raising the visibility of important services offered by non-profits, and can serve as engines of community-oriented economic development.

The current president of the Board of Directors for the Christ Church Children’s Center, a parent of two children at the center, wrote that the center provides a vital service for area working

parents. See Ex. 237. The writer stated that currently, the day care center is housed in two buildings on either side of the church parking lot, so parents, children and staff have to walk through the parking lot frequently. This creates a significant safety issue, in light of the many vehicles that cut through the church parking lot. The child day care center also has concerns about unauthorized pedestrian traffic through the parking lot, walking within feet of the children.

Two church employees wrote that the proposed rezoning would build on the church's heritage of community service. See Exs. 52 and 85. One wrote that the church receives phone calls and visits every day from people looking for help with food and other life issues. See Ex. 85. The other noted that the buildings are very old and in constant need of repair, which no longer makes sense financially. See Ex. 52.

Patricia A. Corley, a member of Sisters of the Holy Names, a Catholic religious community, has been a social worker in Montgomery County for 30 years, and provides child and family therapy at her office in the church on this site. See Ex. 235. She stated that the church's congregation is largely from the Bethesda area and provides excellent social services to a diverse, needy population. She expects that the church will be a likely resource for child care and recreation services when the many new arrivals from Walter Reed Hospital move to Bethesda Naval Hospital and the National Institutions of Health, and that the proposed residential building would provide additional housing choices for new arrivals. Ms. Corley stated that the small group of local residents who have sought legal help to stop the church's proposed expansion may not realize that the church has long been an outstanding and upstanding neighbor, and seeks to redevelop to continue supporting the health and safety of the community. She suggests that these residents must recognize that Bethesda continues to grow and change, and that the entire Woodmont Triangle area will be transformed in the next ten years into a much more active district, with the support of county officials, noting that change is hard for many

people, but it is the natural order of life. Finally, she stated that the church is a valued asset to the community, and deserves the right to improve its property like any other property owner.

Louse Clark, an early childhood education specialist, worked with the church to start a licensed child development center. See Ex. 222. She noted that the church had allocated additional resources to fulfill a commitment to provide continuous child care for children from six weeks of age through kindergarten, and that lack of affordable, quality child care directly affects the workforce and local employers. Ms. Clark notes the objections by some neighbors and changes the church has made in response, and expresses confidence that the church will continue to work with the local community.

Brian J. Depenbrock, a licensed clinical social worker who has provided psychotherapy services at the church and observed its many fine social services, supports the church's plan to remodel its property, provide housing and centralize social and recreation services. See Ex. 182. He repeated many of the points in Reverend Tollefson's letter about the church's role in the community and the need to evaluate this application with regard to that role, and not just on technical grounds.

Diana Echenique, a single mother and former resident of New Orleans, wrote to describe how the church provided housing for her, her young son and her mother after they lost their home due to Hurricane Katrina and ended up in the Washington area. She stated that the church provided food, a child's bed, and even toys for her son, without asking for anything in exchange, even religious affiliation. See Ex. 164. She described the church as an exemplary organization, committed to the community, and requested approval of the rezoning so the church can stay on its property and continue its social services.

Mark E. Miller, a longtime church member, stressed that a considerable investment of volunteer time and money has gone into making this project feasible, that the church has already invested hundreds of thousands of dollars into this project, and that all the money paid by the developer will go back into the new church facilities. See Ex. 138. He also noted that if this project does not go forward,

the church will likely have to sell the property to a developer, so there will be no community center and none of the services the church currently provides. He suggested that larger issues are at stake than the interests of several residents, as the proposed project will benefit many and the interests of the local residents serve few. Mr. Miller also suggested that the alternative for the neighbors could be much worse.

Eugene A. Watkins, a church member since 1941, wrote that the church has continuously served the community and wants to continue doing so by remaining at its location in Bethesda. See Exs. 67 and 136. He considers the proposed development consistent with managed growth for the Bethesda Metro area, as it is within easy walking distance to transit and convenient services. Mr. Watkins argued that the church's plan fits well with most residents' vision for growth in the County.

Dorothy Davis Hofstad, a church member since 1964, was a member of the Church Council when the redevelopment project first began, and heartily endorses it. See Ex. 55.

Mary H. Merrick, a member of the church since 1954, echoed other letters' descriptions of the church's services to the local and global community since 1934. See Ex. 84. She mentioned one church outreach program in which she was active, the organization of a highly successful school for children with learning disabilities, founded in 1961 as the Christ Church Child Center and now known as the Ivymount School, located on Seven Locks Road. Ms. Merrick "know[s] the strength and determination of this congregation and dedication to serving the community" and strongly urges approval of the rezoning.

Andrew P. Masetti, a member of the church for four years, has experienced the church's commitment to the community many times over. See Ex. 99. He stated that through activities such as providing food and clothing to the hungry and poor, creating outreach programs to educate people of all faiths on the importance of improving the environment reducing greenhouse gas emissions, and

providing aid to people in impoverished nations, the church has provided out-sized service to the local community and others.

Form Letters in Support

1. Support for the church's "very necessary plans to remodel parts of its aging property to provide centralized social services in an environmentally sound setting." Ten letters, Exs. 154 (from the Greater Bethesda-Chevy Chase Chamber of Commerce), 155, 163, 165, 166, 177, 178, 205, 224 and 234. The church's proposed redevelopment has many smart growth elements. The church's positive, daily impact on the quality of life in Bethesda should be factored into this decision, rather than making the decision on a strictly technical basis, when the Planning Board has already given its unanimous approval.

2. Church members who support the church's many fine social services and the "very necessary plans to remodel and expand parts of our functionally obsolete property." Twenty-five letters, Exs. 139, 142, 146, 147, 159, 160, 167-172, 180, 186, 189, 193-200, 211-212. The letters describe some of the church's many services such as child care, lunches for the homeless and Toys for Tots, noting that the church has been a fixture in Bethesda since the 1930s and has always been a good neighbor. "Now, when it needs the very community it serves to show support of its role to sustain this social services network, some small number of our neighboring residents and their lawyers have evidently elected to minimize the longstanding, visible commitment that Christ Lutheran has made to the community [and] instead raised objections, such as increased traffic congestion and building shadows." The church has made changes to its plans to address these concerns, and will continue to work with the local community on additional changes. The church's positive, daily impact on the quality of life in Bethesda should be factored into this decision, rather than making the decision on a strictly technical basis, when the Planning Board has already given its unanimous approval. The director, assistant director and Chair of the Board of Directors of the on-site day care center submitted

letters substantially the same as this form, as did five “longtime observer[s] of the many fine social services that [the church] provides.” See Exs. 158, 188 (from the Evangelical Lutheran Church in America, Metropolitan Washington, D.C. Synod), 201, 202, 217, 220, 225 and 228.

3. Concerned members of fellow religious institutions writing in support of the church and its excellent social services. Forty-six letters, Exs. 184, 185, 232(a) – (nn) and 233 (from the Bethesda Presbyterian Church). The letters quote the 2007 Montgomery County Planning Department Survey of Faith Based Organizations, which describes the vital role played by faith-based organizations in the provision of social services in the County, and the increased demand for such services. “To limit the ability of religious organizations to expand is to limit our continuing viability as a valued institution in this region. . . . Land is extremely difficult to find in Montgomery County. Since public policy effectively foreclosed growth north and west in the county, many religious institutions are stymied geographically and face the possibility of closing or moving out of Montgomery County. . . . To allow a few people to prevent the church from following its plans to modernize is to ignore the larger picture that affects all faith-based institutions.” *Id.*

4. The church is an important part of the nonprofit network that provides regular, constant services to individuals and families in Bethesda, and its work must be supported, not hindered. Sixteen letters, Exs. 150-153, 162, 175, 176, 181, 190, 191, 192, 203, 216, 218, 221 and 223. There is a growing need for social services in Bethesda. If the church’s redevelopment plans do not go forward, “it could serve to further imperil key feeding programs and fray the nonprofit social network that is so important to the community.” *Id.*

5. Members of The Center for Family Process who frequently use the church’s facilities for community work. Exs. 229, 230 and 239. The project has been approved by the Planning Board and received the prestigious Smart Growth Alliance recognition, identifying projects worthy of strong consideration and approval by the local community. The small group of local residents who have

sought legal help to stop the church's proposed expansion may not realize that the church has long been an outstanding and upstanding neighbor, and seeks to redevelop to continue supporting the health and safety of the community. These residents must recognize that Bethesda continues to grow and change, and that the entire Woodmont Triangle area will be transformed in the next ten years into a much more active district, with the support of county officials. The church is within easy access to Metro and other public infrastructure, and its congregation is largely from the Bethesda area. Change is hard for many people, but it is the natural order of life. The church is a valued asset to the community, and deserves the right to improve its property like any other property owner. Many of the same points were made in two other letters from individuals not associated with The Center for Family Process. See Exs. 143 and 226.

6. A number of people who participate in chamber music concerts at the church, as performers and/or listeners, wrote similar letters. Exs. 57-60, 61, 64, 76, 80, 83, 140, 141, 144 and 145. They support the church's redevelopment plans to continue its mission and valuable community services in Bethesda. One letter notes the church's commitment to stewardship of the Earth and positive environmental practices. Ex. 140. Two of these letters add that the County should recognize the unique role of nonprofits, "especially those that provide public services that government otherwise would be tasked with providing." Exs. 144 and 145. The church is a highly valued institution providing an array of social services to needy, often hidden individuals and families in affluent Bethesda, as well as adding cultural enrichment through concerts. "To reduce this institution's future to a simple debate over the technical merits of its development plans is to ignore its intrinsic value. . . . If you do, indeed value [the church] and its social mission, please act accordingly" Exs. 144 and 145.

7. Longtime members of the church congregation who support the proposed redevelopment to allow the church to continue offering their mission and community services to the Bethesda

community, building on their heritage and sustaining it. Nineteen letters, Exs. 53, 54, 56, 58, 62, 63, 65, 66, 69-74, 86, 88-90.

8. Five members of the Church Council at the subject church, who express their strong support for the proposed redevelopment to allow the church to continue offering their mission and community services to the Bethesda community, building on their heritage and sustaining it. Exs. 78, 79, 81, 87 and 92. The letters state that the church studied its many options over the years to expand its ministries in Bethesda, and that the proposed redevelopment is the best way for the church to continue to serve those in need of child care, a hot lunch, a place for a support group, family counseling or a place to worship. One letter adds that the gymnasium would allow the church to create a youth outreach program, to be used for a variety of sporting and other youth activities, including indoor tournaments where appropriate. See Ex. 92.

9. Longtime observers of Montgomery County who believe in its leaders and note that many of the County Executive's priorities are part of the church's existence and future, including serving the growing number of immigrants and seniors, adding positive youth development programs, increasing affordable housing, capitalizing on existing infrastructure, protecting the environment by adding green space and concentrating building in less space, and delivering much-needed public services creatively and efficiently. Exs. 156, 157, 179, 183, 204, 208, 209 and 210. These letters note the Planning Board's unanimous support for this project and the opposition of some residents that could imperil the church's 70-year existence. They argue that the plans should be approved based on the church's reputation and its focus on improving our community.

10. Seven fairly new members of the church who express their support for the "very necessary plans" to remodel and expand parts of the property. See Exs. 148, 149, 161, 173, 174, 206 and 207. The services the church provides to the Bethesda community attracted these members to join the church, which has been a fixture in Bethesda since the 1930s and has always been a good neighbor.

The church has made changes in its plans to respond to concerns raised by a small number of neighbors, who have chosen to minimize the church's longstanding, visible commitment to the community. These residents must recognize that Bethesda continues to grow and change, and that the entire Woodmont Triangle area will be transformed in the next ten years into a much more active district, with the support of county officials. This zoning decision should be made taking into account the church's daily positive impact on the quality of life in Montgomery County.

The record also contains 43 letters in opposition to the proposed development, mostly from residents of Glenbrook Road, Rugby Avenue and Battery Park. Some of these also follow a form letter template. The individualized letters are summarized first, followed by the form letters.

Individualized Letters in Opposition

Sara Gilbertson, president of the Battery Park Citizen's Association testified at the hearing and wrote that the proposed rezoning would be incompatible with height and traffic in the Battery Park neighborhood. *See* Ex. 117. She argued that the height of the proposed buildings would not be compatible with the neighborhood, and noted that there would be an intrusion of non-permitted height into a setback area. In her view, "the Planning staff audaciously decided to seek out and even to misrepresent self-serving examples of other low-quality commercial development to dismiss the unparalleled impact of this project on the single-family homes that are the relevant legal standard, and to rely on disingenuous statements to approve the proposed rezoning." Ex. 117.

Herbert Estreicher, who owns and lives in the home closest to the subject site, which would be the most directly affected by the proposed development, testified at the hearing and wrote in opposition. *See* Ex. 122. Mr. Estreicher argued that the proposed buildings would be too large and too close to his home, and would lead to loss of privacy, loss of light, impedance of air circulation, noise, and increased traffic congestion and flow. He considers the proposed seven-foot privacy fences completely inadequate to buffer a 114-foot building. He suggests that the Applicant make the building slightly

smaller to save the few tall trees that currently line the rear of the property, which would provide better privacy. Mr. Estreicher objects to Technical Staff's attempt to justify the proposed development on grounds that the adjacent single-family neighborhood is intended for eventual redevelopment under the Sector Plan. He argues that this neighborhood has a number of newly-built and renovated homes and maintains a stable residential character, and that its residents have a right to peaceful enjoyment of their homes. In his view, the Sector Plan does not authorize or envision extinguishing the rights of current residents to continue enjoying their homes. Mr. Estreicher notes that the Planning Board, in recommending that the Development Plan be considered illustrative so that compatibility issues could be worked out at site plan, failed to actually consider the question of compatibility. He argues that the compatibility decision must first be made at the rezoning stage, and observes that in this case, it is not a question of minor details, but rather of fundamental questions of compatibility that cannot properly be deferred to site plan review. Mr. Estreicher notes that site plan review offers none of the procedural safeguards of the rezoning process, such as the opportunity to be heard on the record by a hearing examiner, to cross-examine the applicant's expert witnesses, and to seek judicial review of an adverse determination.

Bernard and Patsy-Ann Wolfe own and reside in the homes three doors down from the subject site on Glenbrook Road. They testified at the hearing and wrote in opposition. *See* Ex. 124. Mr. and Ms. Wolfe write that they, as well as many of their neighbors, have made substantial investments in their homes, indicating that this is a neighborhood of permanent residents. They argue that the proposed redevelopment would not comply with the purpose and requirements for the PD-44 Zone, would not be compatible with adjacent single-family homes, would not provide safe, adequate and efficient points of external access for traffic, and would destroy natural vegetation and other natural features of the site.

Mr. and Ms. Wolfe contend that the aesthetics of their neighborhood would be overwhelmed by the construction of “giant towers” next to single-family homes. They note that the 11-story office building on the corner of Glenbrook and Old Georgetown Roads is separated from the nearest home by a wide parking lot, unlike the very small building setbacks proposed in this case. They are concerned that the proposed development would bring additional traffic to Glenbrook and Rugby, and to the already-crowded intersection of Rugby Avenue, Glenbrook Road and Norfolk Avenue, creating safety hazards for residents. They note that the Planning Board’s recommendation was based on an assumption that the existing single-family homes in the area are intended for eventual redevelopment in the Sector Plan. Mr. and Ms. Wolfe contend that theirs is a stable neighborhood whose residents have the right to the preservation of their property and peaceful enjoyment of their homes. They argue that the Sector Plan does not authorize or envision extinguishing the rights of current residents to continue enjoying their homes, but rather calls for reviewing rezoning applications for compatibility with existing single-family homes.

Steven A. Teitelbaum, past president of the Battery Park Citizens’ Association, testified at the hearing and wrote a lengthy letter in opposition. *See* Ex. 300. He lives about five houses down Exeter Road from the subject site, and the church is clearly visible from his front porch. Mr. Teitelbaum is a real estate transactional lawyer, describing himself as “temperamentally in favor of development and opposed to NIMBYs,” and a member of the American Planning Association. He wrote in his individual capacity, but believes that his view reflect the input of Battery Park residents.

Mr. Teitelbaum argues that compatibility is the key finding that the District Council must make in a rezoning, and that such a finding cannot be made in this case. He notes that the Planning Board’s finding was not actually a determination of compatibility, but that the question of compatibility should be deferred to site plan review. Mr. Teitelbaum suggests that the District Council cannot “duck the issue” like the Planning Board. He argues that Technical Staff also failed to make a fundamental

compatibility finding with regard to nearby single-family homes, focusing instead on nearby office buildings. He notes that the Sector Plan called for rezonings in this area to be compatible with existing single-family homes, not office buildings. Mr. Teitelbaum considers comparing any project to the “architectural, zoning and planning white elephant of 7979 Old Georgetown Road [(the 11-story office building on the corner of Glenbrook)] the abdication, not the exercise, of professional planning.” Ex. 300.

Mr. Teitelbaum notes that even the Planning Board and its Staff acknowledge that the proposed community center would be inconsistent with a Sector Plan height recommendation. He finds it patronizing for Staff to describe this as a “limited” intrusion of excess height into the restricted area, considering that Bethesda residents litigate over alleged inches of horizontal or vertical excess.

Mr. Teitelbaum notes that Staff refers to the office building diagonally across Old Georgetown Road from the site as a four-story building, failing to point out that it has only three stories above grade and is no wider than a house, making it vastly less intrusive than the buildings proposed in this case. Mr. Teitelbaum argues that Staff’s statement about the church steeple remaining the tallest structure on the site misses the point, that the sheer mass of the two new buildings would overwhelm the church steeple, which will become little more than a minor decorative element.

Turning to concerns about pedestrian safety, Mr. Teitelbaum notes that contrary to Technical Staff’s assertion that existing intersections have crosswalks and pedestrian signals, the nearest intersection, Old Georgetown and Glenbrook Roads, does not have a traffic signal, nor does the intersection of Glenbrook, Rugby and Norfolk.

Mr. Teitelbaum considers support for this project based on streetscape improvement premature, since that will be an issue for consideration at a later stage, not a zoning. He argues that all three schools that would serve this development are overcapacity and expected to remain so. Perhaps Mr. Teitelbaum is unaware of planned capacity increases at the local middle and high schools.

Mr. Teitelbaum expresses dismay at Technical Staff's repeated references to important community functions that the proposed community center would serve. From his perspective, the church already provides the important community functions in its current space, and the only new function would be a private gym, with no benefit to the local community. The Hearing Examiner notes that although the evidence is not clear as to exactly how the gymnasium would be used to benefit the local community, it appears to be inaccurate to call it a "private" facility. Mr. Teitelbaum objects to Technical Staff's emphasis on benefit to the "wider community" rather than examining impacts on homes located nearby. Mr. Teitelbaum's letter closes by stating that the proposed rezoning would be inconsistent with the Sector Plan and with good planning practice.

Robin Strachan and Paul Ravitz own and reside on Glenbrook Road, almost directly across Glenbrook from the subject site. *See* Ex. 123(r). They have made substantial improvements to their home and intend to live there until they are "ready for the nursing home." They are concerned that the proposed development would negatively impact the safety of their neighborhood due to added traffic on Glenbrook Road and Rugby Avenue. They note that parking is allowed on only one side of Glenbrook Road, and that because many homes have shared driveways, on-street parking is a necessity, leaving room for only one car to pass at a time. In their view, the increased traffic volume from the proposed development would present an enormous safety hazard.

Ms. Strachan and Mr. Ravitz contend that the proposed development would loom over existing residential homes and be grossly incompatible. They argue that the proposed development would cause a substantial increase in noise, with 107 dwelling units and a new community center compressed on the same lot as the church. Like the Wolfs, they contend that the aesthetics of their neighborhood would be overwhelmed by the construction of "giant towers" next to single-family homes. They note that the 11-story office building on the corner of Glenbrook and Old Georgetown Roads is separated from the nearest home by a wide parking lot, unlike the very small building setbacks proposed in this case. They

note that the Planning Board's recommendation was based on an assumption that the existing single-family homes in the area are intended for eventual redevelopment in the Sector Plan. They contend that theirs is a stable neighborhood whose residents have the right to the preservation of their property and peaceful enjoyment of their homes. They argue that the Sector Plan does not authorize or envision extinguishing the rights of current residents to continue enjoying their homes, but rather calls for reviewing rezoning applications for compatibility with existing single-family homes.

The Strachan-Ravitz letter was also submitted, nearly word-for-word, by Arlene Bruhn, who lives on Glenbrook Road farther away from the subject site. *See* Ex. 130.

Lilia Topol, a resident of Battery Lane, opposes the proposed redevelopment on grounds that its density and scale would increase traffic and reduce sun light to her community. *See* Ex. 135(a). She argues that the proposed development would be incompatible with the existing single-family neighborhood and suggests that a garden-style townhouse complex would better serve the community.

Van Doorn Ooms and Theodora Ooms, residents of Battery Park, write in opposition on grounds that the proposed project would adversely affect their neighborhood in terms of aesthetics, safety and especially traffic. *See* Ex. 131. They argue that it would be hazardous to add more traffic (the Ooms estimate 500 owners, families, friends, parishioners, workers and visitors) to the already congested access points on Glenbrook and Old Georgetown Roads.

Arthur R. Dornheim, a resident of Battery Park, fears that the proposed development would destroy the residential appearance of both sides of Old Georgetown Road beyond Glenbrook Road, as well as adding noise and reducing air quality. *See* Ex. 134. He is most concerned, however, about added traffic problems from the new residents and gym users. Mr. Dornheim suggests that the height of the adjacent rescue squad building should serve as a model for the heights of new buildings.

Marion R. Herz, a Battery Place resident, wrote in opposition to the "perpetual development" in Bethesda, arguing that Bethesda cannot maintain its sense of community and quality of life if this

development is allowed to occur. *See* Ex. 135(c). Ms. Herz notes that every open space is being considered for development, mostly for a mix of offices, retail and condominiums. She cites nine individual development projects in Bethesda, in addition to the move of the Walter Reed medical facility to the National Naval Medical Center and the development underway on the old Giant site on Arlington Road. Ms. Herz states that the area is experiencing a housing slump and a glut of unsold, high-priced condominiums. She contends that even with the required MPDUs, these vast majority of these homes will be affordable only to upper-income people, driving everyone else out of Bethesda and forcing many of its workers to commute back and forth. This, she argues, makes traffic and pollution problems worse and detracts from population diversity and quality of life.

Form Letters in Opposition

1. Seven letters from residents of Rugby Avenue or Glenbrook Road who argue that the three-dimensional model of the pre-remand project that was submitted in this case dramatically demonstrates its incompatibility with existing homes in the area. *See* Exs. 323, 324, 325, 351, 352, 353 and 354. They argue that the proposed project would fundamentally change the basic character of the neighborhood due to the “astonishing” mass of the buildings and their very small setbacks. These residents contend that in finding compatibility because the nearby neighborhood is recommended for eventual redevelopment, Technical Staff ignored the fact that there are three large, newly constructed homes on one side of Glenbrook, and a number of older but stable homes on both Glenbrook and Rugby, not a series of vacant lots. They argue that existing residents have the right to continued peaceful enjoyment of their homes. These letters describe obvious problems for the adjacent properties of loss of privacy, loss of light, impeded air circulation and noise. They describe obvious problems for homes farther away of increased traffic and congestion, urbanization of a charming residential area, and the “sheer visual ugliness of the massive buildings proposed for the site.” They object to cutting down

a dozen or so tall trees, noting that a green roof does not provide the benefits of ground level vegetation. These writers are also concerned about increased traffic, in particular on Rugby Avenue.

These letters note that the Planning Board's recommendation was couched in a suggestion to leave the question of compatibility to be resolved at site plan review, which the writers believes would violate the District Council's responsibility under Section 59-D-1.61 to make a finding regarding compatibility. The letters close by describing the proposed project as the wrong development for the neighborhood.

2. Three letters from residents of City Commons on Battery Lane, raising concerns about how the proposed development might reduce sunlight to their homes, whether the current pedestrian passage between the rescue squad parking lot and Rugby Avenue would be preserved, whether the proposed residential building is appropriate for a neighborhood zoned for much lower buildings, and how the addition of almost 200 cars will influence traffic and congestion. *See* Exs. 135(b), (d) and (e). The writers suggest that the only way to resolve most of these issues is to significantly downscale the project.

3. Twenty-two letters from Battery Park residents opposed to this "massive project" that will have an adverse impact with regard to aesthetics, safety and traffic. *See* Exs. 115, 116, 118, 119, 120 and 123(a) through (q). The writers contend that the proposed project would directly violate the 1993 General Plan Housing Objective 5E, which seeks to "maintain the safety and quality of the neighborhoods." They argue that the "monstrous" structure proposed here will also violate the Sector Plan's call for compatibility with existing single family homes on this site, and Housing Objective 5C from the General Plan, which states that special care should be taken when introducing new uses to old neighborhoods. The writers argue that sunlight to their homes will be compromised, lights from the new structures will infiltrate their homes at night, noise levels will escalate, pollution from cars will increase, and traffic and pedestrian incidents will likely increase. These letters note that the new

community center would be inconsistent with the Sector Plan's height recommendation, that its height will have adverse effects on surrounding homes, and that its height and setback should be modified. These letters further argue that the neighborhood does not possess adequate crosswalks or traffic signals, and that the points of access on Glenbrook and Old Georgetown would be dangerous for pedestrians and create a nightmare for commuters.

IV. SUMMARY OF HEARING

Since some of the testimony from the pre-remand hearings is still relevant, it remains in this report for easy reference;²² however, to avoid confusion, Part IV of this report, the "Summary of Hearing," has been split into two sections, "Post-Remand Testimony" and "Pre-Remand Testimony." The post-remand hearing began on February 19, 2010, but no evidence was taken on the first day. Therefore, all references to the post-remand testimony will concern testimony given on February 22 and 23, 2010.

Applicant called five witnesses during the post-remand hearing, all of whom had testified in the pre-remand hearing. They were Michael Foster, an architect; Philip Perrine, a land planner; Edward Wallington, a civil engineer; Michael Lenhart, a transportation planner; and Marvin Tollefson, pastor of the Christ Lutheran Evangelical Church. One community witness, Melanie Folstad of Chevy Chase, also testified in support of the application.

Three community witnesses testified in opposition, Jim Humphrey, Chair of the Montgomery County Civic Federation Land Use Committee; Stephen Teitelbaum, on behalf of the Battery Park Citizens Association (BPCA); and Herbert Estreicher, an abutting land owner and member of the Committee of Concerned Residents of Glenbrook Road and Rugby Avenue. The Committee of Concerned Residents and Mr. Estreicher were represented jointly by attorney David Brown.

²² On the third day of the post-remand hearing, opposition counsel raised the question as to whether the pre-remand testimony and exhibits would still be part of the record. Former Hearing Examiner Carrier replied that they would remain

POST-REMAND TESTIMONY:**A. Post-Remand Applicant's Case and Community Support**1. Michael Foster, Architect. Tr. 2-22-10 at 18-77.

Mr. Foster was designated as an expert in architecture at the original hearing in this matter, and worked on both the original design and the revised one. He noted that the existing buildings on the site present a long stretch of institutional use, overgrown by trees and with a barrier along Old Georgetown Road in the form of a retaining wall. Mr. Foster argued that the proposed new buildings would “engage the portion of the site that the church owns in a way that the PD-44 was envisioned to allow for a broad combination of multi-family residential, as well as church education and worship functions.” Tr. 2-22-10 at 19. In his view, the recommended PD-44 zoning envisioned a combination of single-family and multi-family buildings in the area, in a context of apartment buildings with 10 to 12 stories and the nearby CBD, which has taller commercial buildings and recently approved residential buildings.

Mr. Foster noted that the zone requires 50 percent of the site in green space, and that the proposed plan would preserve 48 percent of the site in ground-level green space and 2 percent in a green roof, which has both recreational and environmental benefits. *See* Tr. 2-22-10 at 19 and 33-34. (On cross-examination, Mr. Foster conceded that the roof-top space represents 8.7 percent of the total green space. *See id.* at 46-47.) Mr. Foster described the green space as clustered near the homes that abut the subject property, where the compatibility is most sensitive. Tr. 2-22-10 at 19-20. He noted that the proposed building would be set back 40 feet from the side lot line of the closest home (the Estreicher residence) and 142 feet from its rear lot line, as well as 105 feet from the closest lot line of the Wash residence. He also stressed the compatibility of the “bulk plane angle,” as shown on Exhibit 382(1). Mr. Foster explained that the bulk plane angle is the angle of measurement from the plane of the property line to the

in the record, but she would consider only those portions which continued to have relevance. Tr. 2-23-10 at 4-5. Given this ruling at the hearing, the entire pre-remand summary is included as a separate section in this part of the report.

bulk of the building. He noted that between two typical houses on Glenbrook, the angle looking up is about 72 degrees. Lowering the buildings proposed on the subject site and pushing them farther away reduces the bulk plane angle to 51 degrees, mitigating the impact of the building's bulk. *See id.* at 21, 23. In the case of the Sunday residence, the bulk plane angle is shown at 45 degrees, which Mr. Foster described as a much more suburban model than the angles typically found in this urban setting. *See id.* at 22.

Mr. Foster observed that the side yards proposed here between the subject property and the nearest houses, at 40, 56, 105 and 142 feet, respectively, are “exponentially larger” than the eight-foot to 12-foot side yards typical in a comparable residential neighborhood. *See id.* at 21. He further stated that this was done without crowding Old Georgetown Road, by breaking up the plane of the buildings and setting the middle section back by 40 feet. As a result, with the building setback, the 100-foot street right-of-way and two yards with a minimum of 50 feet, the setback between properties across Old Georgetown Road is 200 feet. *See id.* at 21-22.

Turning to the mechanics of parking and loading, Mr. Foster stated that a relatively small site like this typically has only one parking and loading entrance, but this plan proposes two points of access: a Glenbrook Road driveway to serve as the primary access for church/community center visitors, and an Old Georgetown Road alley entrance, as the primary residential entry point. This, he observed, allows a conflict-free flow for day care center drop-off and pick-up as well as a separate, unobstructed traffic flow for residents of the multi-family building. Mr. Foster also explained the circulation pattern shown on Exhibit 382(p)(1) – the yellow is the loading dock, which is located along the alley from Old Georgetown Road, away from the nearby single-family residences; dotted lines underneath the loading dock represent parking spots in the garage level beneath it; and blue identifies circulation for the church and the day-care center drop-off, *See id.* at 26-28. He noted that the day-center itself, shown in purple, has to have ground level space for emergency access.

Mr. Foster observed that the new church entrance is proposed at the southwest corner of the site, instead of the current middle-of-the-block location, creating a strong civic presence. He described the location of the main entrance to the residential building on Old Georgetown Road as a good ceremonial, pedestrian entrance. *See id.* at 29-30. He noted that the day care center has direct access to the open area and playground behind the community center, and that the public will be able to walk through the site on a path between Rugby Avenue and Glenbrook Avenue, improving on the present informal “path” through the church parking lot.

The proposed plan provides access from Rugby Avenue to Old Georgetown Road only for emergency vehicles, using bollards moveable only by emergency crews to prevent routine access. *See id.* at 32-33.

Mr. Foster described proposed landscaping, which includes “deep street planting” on the perimeter of the playground for acoustic and visual buffering. He noted that in his opinion and that of the county arborist, the existing trees on the site are low quality, some in poor health, and should be removed. *See id.* at 36-38. He stressed that more than the existing trees being not worth saving, it would not be good practice to retain them.

Addressing building features, Mr. Foster stated that the church/community center building would have an apse shape, expressing the shape of the worship activities going on in the building. It would open onto a large civic plaza. Its impact on nearby residences would be reduced by the stepping back the height of the top two stories (above the fifth floor) so the building has tapered edges and soft shoulders. *See id.* at 38. He noted that the height of the residential building has been calculated per the definition in the Zoning Ordinance, which measures height from the level of any existing terrace. *See id.* at 41. The existing buildings sit on a terrace several feet above the grade of Old Georgetown Road, and the new buildings would also sit on a terrace. Mr. Foster noted, however, that the 10 to 12-foot retaining wall that currently separates the church property from the sidewalk (seen on Exhibit 30) would be removed and

replaced with a sloping area of grass and other landscaping. In his view, this would be more compatible with the surrounding area than a “foreboding” wall. *Id.* at 44.

Mr. Foster completed his direct testimony by opining that the proposed reclassification is compatible with the surrounding neighborhoods on both sides of Old Georgetown Road, that the proposed development would have no detrimental impacts as compared to the existing conditions, and that the proposed development would be consistent with the general welfare of the community and the residents of Montgomery County. *See id.* at 45-46.

On cross-examination, Mr. Foster agreed with a statement from a letter in support of the project by land planner Phil Perrine, who stated that the residential structure would be more intimately integrated with the church/community center building than would be possible under conventional zoning. *See* Tr. 2-22-10 at 52-53. Mr. Foster stated that the integration would be architectural, not functional. He described it as integration of the scale and proportion of the building masses to protect the maximum amount of open space outside the building. Functional integration, he explained, would be limited to the parking, pedestrian paths and vehicular circulation.

Mr. Foster also agreed with Mr. Perrine’s statement that the church/community center building would have a strong church identify and a strong historical message of its mission. He agreed that a steeple like the existing church has is symbolic of a church, but described the apse shape proposed for the rounded end of the building as a stronger church form, which has been in use for 2000 years. *See id.* at 54-55.

Under cross-examination about building height, Mr. Foster stated that in the original rezoning hearing the multi-family building was described as 114 feet tall, but that was without taking into account the Zoning Ordinance provision stipulating that an existing terrace is not part of the height calculation. Since the site has an eight-foot terrace, the 114-foot height would be considered 106 feet under the definition of building height in the Zoning Ordinance. *See id.* at 55. The height of the building is now 94

feet per the Zoning Ordinance definition, 12 feet lower than the previous version. *See id.* Mr. Foster disagreed with the suggestion that from across Old Georgetown Road, the proposed multi-family building would appear 102 feet tall, rather than 94. He stated that across the 200-foot distance of between the proposed buildings and the houses across the street, the human eye cannot see a level plane, but sees things from a ground plane. Based on the height to distance ratio, the bulk plane angle from across the street is very small, less than 30 degrees. In Mr. Foster's view, the neighborhood across the street currently looks at a three-story institutional building, setback from the street. With the proposed development, those residents would look at a five-story institutional building, with two stories stepped back, and set back farther. He finds no compatibility difference between the current and proposed buildings. *See id.* at 57.

In response to questioning by Jim Humphrey, representing the Montgomery County Civic Federation, Mr. Foster explained that from a construction standpoint, the proposal includes three physical structures: the parking garage, which is its own structure for fire code reasons, the multi-family building and the church/community center building. *See id.* at 64-65. He noted that on Exhibit 382(g), the demarcation between the residential and building and the church building can best be seen at the roof lines, where the sloped roof of the church building meets the roof of the residential building. *See id.* at 65. On the floor plan, Exhibit 382(p), the line of demarcation is the colored line along the second row of parking spaces (going right to left), in the middle of the church/community center parking. Mr. Foster explained that there is no physical separation between the two buildings, as seen from the outside. There is architectural differentiation, but the two buildings are joined by a common fire wall.

Mr. Foster addressed this issue again on re-direct, and clarified that the front wall of the two buildings is not one continuous wall. A section of the residential portion is shown recessed with a 40-foot setback, to allow the entrance to come in, then project back out. Also, the church entrance has a setback of about 70 feet, creating a civic plaza. Those features, Mr. Foster opined, break down the visual

impact of the two buildings so they really look like three separated structures. *See id.* at 75-76; Exs. 393 and 394.

2. Philip Perrine, land planner. Tr. 2-22-10 at 86-188.

Mr. Perrine was designated an expert in land planning during the first set of hearings in this matter. In the remand hearing, he began by making a few observations about the proposed plan (*see* Tr. 2-22-10 at 87-89):

- Exhibit 382(g) shows a large open area on the north part of the site that is about 15,000 square feet or more, which is twice the size of an R-60 lot.
- Setbacks proposed from the adjacent houses are 56 feet from lot 8, 105 feet from lot 10, 142 feet from the rear of lot 5 and 40 feet from the side of lot 5.
- The plan shows a large public open area at the corner of Glenbrook and Old Georgetown Roads, with a sidewalk area ranging from 49 to 60 feet wide off of Old Georgetown Road.
- The face of the building facing Rugby Avenue is 75 feet long, and there is a 105-foot setback before there is any other face of the building towards that direction.
- The plan proposes two separate buildings located in three sections – a west section of the residential building that is set back 52 feet from Old Georgetown Road; an east section of the residential building with a 77-foot setback; and the church/community center building, which has a setback ranging from 49 to 60 feet.
- The church/community center building has a semi-circular face towards Glenbrook Road, while the residential building presents a more rectangular face towards Old Georgetown Road.
- The residential building is proposed at 94 feet in height, or 102 feet above the curb of Old Georgetown Road. The church/community center building is proposed at 78 feet in height. Both of the buildings would be lower than existing buildings on nearby Battery Lane, as well as the high-rise across Glenbrook Road from the subject site.
- The proposed plan includes a walkway, available to the public, between Rugby Avenue and Glenbrook Road.

Mr. Perrine submitted a report after the remand (Exhibit 382(d)) that covers sector plan compliance, conformance with the PD-44 Zone, and compatibility with surrounding uses, existing and proposed. He addressed each topic in turn.

Mr. Perrine referred to pages 27 to 29 of the Hearing Examiner's report on the original hearing as a good description of the Sector Plan. He highlighted the plan's desire to include housing opportunities within Woodmont Triangle. Mr. Perrine noted that the Sector Plan recommended stepping down heights from the Metro station to the edges of the CBD, but also provided incentives for increased building heights to encourage new housing opportunities at all income levels. *See* Tr. 2-22-10 at 89-90, citing

Sector Plan at 11. In Mr. Perrine's view, the Sector Plan's recommendation for a building height limit of 50 feet within the first 60 feet off of Old Georgetown Road does not apply to the subject property – it stops at the property's southern edge. *See id.* at 90. He opined that a 35-foot height limit recommended in the Sector Plan for Block 19 appears to include some of the church property; and recalled that the Staff Report found that the 35-foot height recommendation applies to Lots 9 and 11 on Rugby Avenue and Lot 9 on Glenbrook Road.²³ *See id.* Mr. Perrine appeared to agree with Staff's finding on that issue, although he found it hard to tell exactly what is included. Mr. Perrine observed that the 35-foot height limit is the limit under the R-60 Zone, while the Sector Plan recommends PD-44 zoning, and that the Sector Plan (page 11) describes its height limits as guidelines.

Mr. Perrine remarked on language from Attachment 11 to the Staff Report (page three, bottom paragraph) stating that the proposed multi-family building and church/community building maintain a 50-foot height before increasing to their full height and to the 60-foot setback, and that although it was not required on this site, restricting the height to 50 feet continues the plan's recommendation for Old Georgetown Road properties and contributes to the project's compatibility with the Sector Plan. *See Tr.* 2-22-10 at 91-92. Mr. Perrine agreed that this setback is not actually required for the subject property, and with Staff's finding regarding Sector Plan compatibility. *See id.* at 92.

Mr. Perrine also cited Attachment 11 to the Staff Report (page four, second full paragraph) regarding the 35-foot height limit. There, Staff makes several findings:

- The mass and shape of the proposed building contribute to the project's compatibility with the community, including the houses to the north.
- On the Sector Plan's building heights map, lots 9 and 11 on Rugby Avenue, and lot 4 on Glenbrook Road, are within the area recommended for a 35-foot height limit. While lots 9 and 11 are within the setback area, lot 4 is only partially shown in the setback area; the church/community center building, which is proposed at a height of 78 feet, intrudes approximately 19 feet into lot 4. This portion of the building is curved, reducing the overall mass and scale of the building.

²³ Although the transcript quotes Mr. Perrine as referencing "lot 9 on . . . Glenbrook," (Tr. 2-22-10 at 90), he clearly meant "lot 4 on Glenbrook," because that is the lot to which Technical Staff was referring. Mr. Perrine subsequently referenced the lot as "Lot 4." Tr. 2-22-10 at 92.

- The proposed setback of the church/community center building is 40 feet to the property line of the closest Glenbrook Road dwelling. The setback area at the rear of the multi-family building, which includes open space and a play area, establishes a compatible relationship with the single-family dwelling to the immediate north.
- The project's building heights are sufficiently compatible with the houses north of Old Georgetown Road.

Mr. Perrine reiterated that the Sector Plan height recommendations were guidelines, noting that the plan recommended the subject property for the PD-44 Zone, which does not have a height limit, and in which one would expect some height above 35 feet. In Mr. Perrine's view, a 35-foot height limit is not consistent with a recommendation for the PD-44 Zone. *See id.* at 94-95. He does not believe the intent was to try and ensure compatibility with the neighboring homes by keeping a 35-foot height limit on the areas closest to those homes. He also testified that one member of Technical Staff described the including of that 35-foot height limit as an error, although that is not the conclusion memorialized in the Staff Report.²⁴

Mr. Perrine acknowledged that if the 35-foot height limit is given no weight, and the 60-feet-within 50-feet-of-the-road limit is not applicable, that leaves the subject property with no Sector Plan height limit. He observed that there are properties on nearby Battery Lane with no height limit. He opined that the Sector Plan's focus was on how to transform the Woodmont Triangle from a collection of low-rise buildings with some individual retail uses to allow for more residential development. The focus was on the CBD, and the planners just didn't get to the subject property or Battery Lane. *See id.* at 96-97.

Mr. Perrine agreed with Technical Staff's finding (Att. 11, page four, last paragraph) that the height of the proposed buildings is compatible with the single-family dwellings to the immediate south, across Old Georgetown Road. *See id.* at 100. He noted Staff's observations that the height of the building is distributed to improve its compatibility, that the buildings are proposed at a height of 50 feet for the portions closest to Old Georgetown Road and that Old Georgetown Road is 100 feet wide. Mr.

²⁴ Former Hearing Examiner Carrier gave the Applicant the opportunity to secure a written statement from Technical Staff on this point, but no such statement was submitted.

Perrine also observed, with regard to the Sector Plan's recommendation for a step-down in heights from the metro station to the edges of the planning area, that there is an existing ten-story building on Battery Lane and an 11-story building across Glenbrook Road from the subject property on Old Georgetown Road. He stated that if the 11-story building were to be replaced, the Sector Plan's height recommendation would permit a building there up to 110 feet in height (assuming 15 percent MPDUs, resulting in a density bonus). *See id.* at 102.

Mr. Perrine considers the bulk plane angle a good way to describe the relationship between height and setback. He noted that the R-60 Zone has a maximum height of 35 feet and a minimum rear setback of 20 feet, which results in 1.75 feet of building height for every foot of setback – another way to describe the bulk plane angle. *See id.* at 105-106. The minimum side yard setback is eight feet, and the sum of both sides must be at least 18 feet. Assuming a ten-foot side yard, a 35-foot building height would produce 3.5 feet of height for every foot of setback. The present project, he observed, has a 56-foot setback from one of the abutting residential lots, creating 1.68 feet of building height for every foot of setback, less than is required under R-60 standards.

Mr. Perrine pointed out that the proposed buildings would basically sit either on the footprint of an existing building or within existing surface parking area. *See id.* at 106-107. As a result, the green area shown on the ground is very comparable to the existing green area on the ground. He also emphasized that the sense of bulk and massing is reduced by dividing the project into two separate buildings with three separate sections.

In Mr. Perrine's view, the proposed development would be compatible with nearby residential dwellings on both sides of Old Georgetown Road, and would not surround or isolate the 20 homes remaining on Glenbrook Road and Rugby Avenue. *See id.* at 108. He noted that the Battery Park neighborhood for years has been separated from the Glenbrook and Rugby residences by institutional uses – the church and the fire and rescue squad. The proposed development would not change that, nor

would it change the access for residents on Glenbrook and Rugby to the park located just north of the subject site near the intersection of Glenbrook and Rugby and to the CBD. *See id.* at 108.

Mr. Perrine opined that the Sector Plan's recommendation for a 50-foot height for the first 60 feet from Old Georgetown Road (which he believes does not apply to the subject property) referred to the curb line, not the right-of-way line. *See id.* at 101. He noted that the curb is straight along this section of roadway, and he believes the Sector Plan was aiming for an urban form related to an existing street, to create a compatible relationship with buildings along Old Georgetown Road, rather than using a normal right-of-way setback. *See id.* at 101-102.

Mr. Perrine summarized the bases for his finding that the proposed development is consistent with the Sector Plan and compatible with the surrounding area thus (*Id.* at 108-112):

- 50-foot building height for the first 60 feet from the curb of Old Georgetown Road, even though that recommendation does not technically apply.
- Two separate buildings with three separate sections.
- Generous open space to the north, more than twice the size of an R-60 lot.
- Loading area off the Old Georgetown Road driveway, away from abutting residences.
- Face of building toward Rugby Avenue is only 75 feet wide, with a very generous setback before the next section of building face.
- Large open area at the intersection of Glenbrook and Old Georgetown, with a semi-circular building façade facing Glenbrook.
- Building heights step down from 11 stories across Glenbrook, ten stories on Battery Lane, and taller buildings closer to the Metro station.
- 110-foot building height limit recommended in Sector Plan for site of existing 11-story building across Glenbrook.
- Residential building steps back in height on the upper three floors.
- 100-foot width of Old Georgetown Road creates a one-to-one relationship between distance to residences and building height.

Mr. Perrine reviewed the calculation of MPDU requirements for the site. The land area of the project is 2.006 acres times 44 units per acre, and you round down to figure out the maximum permitted number of units, so that's 88 units. *See id.* at 103. With the full bonus density for providing 15 percent MPDUs, that number is multiplied by 1.22 for a 22 percent increase, resulting in a total of 107.36 units, which is rounded down to 107. Fifteen percent of the 107 units must be MPDUs, which comes to 16.05

units, and that is rounded up to 17. Thus, 17 of the 107 units must be MPDUs, leaving 90 market units – two more than would be permitted without the bonus density. *See id.* at 104.

Mr. Perrine detailed the bases for his finding that the proposed development would be consistent with the purpose clause for the PD Zone thus (Tr. 2-22-10 at 114-123, 125):

- Consistency with the Sector Plan as already discussed.
- PD zoning allows the plan to be designed without the constraint of particular setbacks, including between the two buildings. This allows the project to be “more intimately designed and interconnected” with the parking area beneath both buildings. (Tr. 2-22-10 at 115.)
- Facilitating and encouraging social and community interaction: Mix of residential, church and community center serving the community at large as well as church members and residents of the multi-family building.
- Distinct visual image created along Old Georgetown Road at Glenbrook
- Provides market and moderately priced units, and units of various sizes. Adds multi-family housing on the Sector Plan’s “Block 19,” a small area that includes the subject site.
- Preserve and take the greatest possible advantage of trees and minimize grading: Mr. Foster described it properly. The existing trees are not flourishing. It makes more sense to remove them and put in hardy species that can withstand this kind of setting. Existing terrace is basically maintained, with the residential building to be built on the existing terrace and the church/community center having a lower level entrance as the grade comes down toward Glenbrook Road. (Mr. Perrine cited Attachment 10 to the Staff Report, which stated that many new or redevelopment applications will unavoidably result in a loss of a specimen tree or trees, that the existing trees on the subject site are not in very good health, and that one specimen tree to be removed is in poor condition and the second is a non-native invasive. Staff also noted, per Mr. Perrine, that an alternate site layout would not alter the need to remove these two specimen trees.)
- Open space conveniently located for use by the community as a whole: The open space to the rear provides a buffer or transition between the proposed buildings and the closest residences, as well as a play area for the day care center and seating area for the residential building. Mr. Perrine referred to his testimony during the first hearing in this case, when he explained the setting and historical evolution of this site. He considers the open space now proposed at the rear of the site to be a considerable amount of open space at a location adjacent to a CBD. He noted that there is also a broad open space near the entrance to the church, appropriately located at the corner of Old Georgetown and Glenbrook.
- Comprehensive pedestrian circulation network: The project would provide a broadened sidewalk along Old Georgetown, a sidewalk along Glenbrook and a walkway through the property between Glenbrook and Rugby.
- Large-scale development, i.e. at least 50 units: The project would provide 107 units and would result in assembling two acres of land from several lots, which is a fairly large piece of property in or near a CBD.
- Maximum of safety, convenience and amenity: Pedestrian connection between Rugby and Glenbrook and to surrounding sidewalk system; vehicular access from both Old Georgetown Road and Glenbrook Road. Pedestrian access to/from Glenbrook would be improved by flattening out a currently steep driveway. Safety would be improved by putting all parking underground, reducing potential for pedestrian/vehicular conflict.

- Compatibility: see earlier testimony.

Turning to school capacity, Mr. Perrine cited Exhibit 382(f), a memorandum from Technical Staff to the Planning Board with a recommendation for mid-cycle fiscal year 2010 school test results, which brought the Bethesda-Chevy Chase and Seneca Valley clusters out of moratorium. The Planning Board approved that recommendation on January 14, 2010. *See* Tr. 2-22-10 at 123-124.

When asked whether the PD Zone is an appropriate zone in an urban area, Mr. Perrine noted that the zone was created in the late 1960s or early 1970s, when the County was continuing to be suburbanized, with few urban areas. It was virtually an all purpose zone, with density ranging from two dwelling units per acre to 68 (Applicant's counsel suggested that the highest density is 125 units per acre), with adjustments for the varying density in the green area requirements. Mr. Perrine stated that the reference in the compatibility provision of the zone, requiring a 100-foot setback for any use other than a single-family house unless the site is in or near a CBD, is a broad measure to try to achieve compatibility. In his opinion, there are many locations where townhouses much closer than that to single-family homes are considered compatible. Mr. Perrine observed that the 100-foot setback requirement does not apply here due to the proximity to the CBD and because the adjoining property is recommended for the PD Zone, not for a single-family zone. Tr. 2-22-10- at 127. Mr. Perrine also noted that in recent years, the PD Zone has applied to more urbanized areas, which is sometimes difficult to do because of the purpose clause requirements.

In sum, Mr. Perrine opined that the proposed rezoning will satisfy all the requirements of the PD Zone purpose clause, will be compatible with existing and planned uses in the surrounding area, will not have any detrimental impacts on the surrounding area, given the setting, will be served by adequate public facilities and will be suitable for the site. *See id.* at 128.

Opposition counsel David Brown questioned Mr. Perrine extensively about some of the numbers on Exhibit 382(b), while holding questions about the accuracy of those numbers for the applicant's engineer. *See id.* at 140-44. Mr. Perrine testified as follows:

- The existing building square footage on the property is 15,756 square feet and the net lot area is about 80,000 square feet, leaving roughly 65,000 square feet currently not occupied by buildings.
- Proposed building footprint is about 35,000 square feet, and the floor area of the residential building is proposed at 175,000 square feet.
- Total building footprint at grade plus "gross vehicular coverage (roads and parking) is currently about 44,000 square feet, and will be almost 45,500 with the proposed plan.
- The proposed development would more than double the amount of building footprint and increase building floor area by a factor of more than six.
- If the property were redeveloped with just the residential building under the PD-44 Zone, without the church/community building, the proposed 107 units would theoretically fit in a building with five floors, and such a building could be designed in a way that would be compatible with the community.

When asked about the intent behind the Sector Plan's zoning recommendation for this site, described in the plan as allowing "the near term redevelopment of an existing church property," Mr. Perrine declared that he does not know whether the County Council anticipated that such redevelopment would include a church or not. *See id.* at 144-45.

Mr. Brown referred Mr. Perrine to a statement in Attachment 11 to the Staff Report (page five, first paragraph) that the proposed building setbacks must be sufficient to mitigate negative impacts on existing residents on both sides of Old Georgetown Road, and that guidance as to the sufficiency of the setbacks is found in the Zoning Ordinance. Mr. Perrine agreed that the Zoning Ordinance can serve as a

guide in this regard, and that in part, Staff was referring to the PD Zone's compatibility standards. Mr. Perrine does not adhere to the Staff's view that based on the PD Zone, a 100-foot setback should be considered the high end and 30 feet the low end. He prefers to follow Mr. Foster's bulk plane angle analysis, assessing the height per foot of setback. Mr. Perrine described "bulk plane angle" as a common descriptor, used in urban design textbooks, of what people actually experience. He explained that when a person looks to the side or top of a building, if it is far away it has less sense of being tall than if it is close. This, he maintained, is the theory behind the Staff's analysis of height and setback. Mr. Perrine acknowledged, however, that the Zoning Ordinance does not use the term "bulk plane angle," so there is no guidance on how to analyze it.

Mr. Perrine focused on Mr. Foster's comparison of the bulk plane angle between two of the existing homes and the bulk plan angle between those homes and the proposed building, noting that the latter is a smaller angle. He also referred to his own testimony, performing a similar analysis using setback per foot of height.

Mr. Perrine acknowledged that Staff's discussion of a setback/height ratio may have been a reference to the compatibility requirement of the PD Zone, which specifies that where a property adjoins land that is recommended in the applicable master plan for single-family residential use, no building may be constructed at a height greater than its distance from such adjoining land. *See id.* at 148; Code 59-C-7.15. He agreed that if that compatibility requirement were applied here, the church/community center building, proposed with a 40-foot setback from the Estreicher home, could be no greater than 40 feet tall, and the building nearest to the Wash property could be no taller than its 56-foot setback. *See Tr. Feb. 22* at 149, 150. The remaining setbacks at the rear of the property would satisfy the requirement for a one-to-one setback/height ratio. Mr. Perrine was quick to add, however, that in his view, Section 59-C-7.15 does not apply at this location because it is in close proximity to the Bethesda CBD. *See id.* at 149, 151.

Alternatively, he suggested that a waiver of the requirement might be available under Section 59-C-7.15(C). *See id.* at 151.

Mr. Brown also questioned Mr. Perrine about the Sector Plan's recommendation, just south of the subject property, for a 50-foot height limit within 60 feet of Old Georgetown Road. Mr. Perrine confirmed that although the parties and the Technical Staff now agree that this recommendation does not technically apply to the subject property, the Applicant has endeavored to comply with it as an aid to compatibility. *See id.* at 152-53. He agreed that if the 60-foot distance were measured from the existing right-of-way line instead of the curb line, the proposed church/community center building would violate the setback recommendation by eight feet. Mr. Perrine further confirmed that if the development proceeds, the Applicant will be required to dedicate an additional 15 feet of right-of-way along its Old Georgetown Road frontage, bringing the right-of-way line 15 feet closer to the proposed building. Thus, measuring the 60-foot distance from the future right-of-way line, the church/community center building would violate the setback recommendation by 23 feet. *See id.* at 153-54.

Turning to whether the two uses proposed on the site would have any integrated operational features, Mr. Perrine stated that residents of the multi-family building would not have any special privileges with regard to use of the church/community center building that would be different from members of the general public, other than proximity. *See id.* at 157. He was instructed by Applicant's counsel to defer to the church's pastor the question of whether church/community center users would have any privileges with regard to the multi-family building, although it was Mr. Perrine's understanding that the rooftop areas would be for building residents, not the community at large.

Mr. Perrine opined that the proposed development would be consistent with the Sector Plan's recommendation that building heights should step down from the Metro area to the edges of the planning area, even if you ignore the ten-story building across Glenbrook from the subject site. *See id.* at 158. He acknowledged that currently, except for that one building, the buildings nearby on Old Georgetown Road

are lower in height than what is proposed in this application. Mr. Perrine stressed the Sector Plan's height recommendations, which call for buildings up to 110 feet in height on Glenbrook Road just south of the subject site, just inside the CBD boundary. *See id.* at 159.

Mr. Perrine agreed that a portion of the proposed church/community center building would sit on Lot 4 and would exceed 35 feet in height, although he stressed that the Sector Plan contains only guidelines.

Under questioning from Jim Humphrey, representing the Montgomery County Civic Federation, Mr. Perrine stated that he did not know whether the Department of Fire and Rescue Services had been contacted as to whether the type of grass pavers proposed for emergency vehicle access from Rugby Avenue to the Old Georgetown Road alley would be acceptable. *See id.* at 164. He noted that such discussions will certainly take place during site plan review if the project goes forward.

Mr. Humphrey asked Mr. Perrine whether he was aware that the Department of Fire and Rescue and Services discourages pedestrian use of grass pavers intended for emergency vehicles. Mr. Perrine, who testified under Mr. Brown's cross-examination that pedestrians could walk across the grass pavers to the Fire and Rescue parking lot next door to get from Rugby to Old Georgetown Road north of the site, was not aware of such a position, or of the Silver Spring case in which Mr. Humphrey stated that such a position was applied. He clarified, however, that on closer examination, the development plan shows a sidewalk running along the north side of the residential building, so pedestrians would not have to walk through the Fire and Rescue parking lot to reach Old Georgetown Road north of the site.

Mr. Perrine opined that the 35-foot height limit shown on the Sector Plan's height map for Lot 4 of the subject site is just a guideline, which he believes does not have to be followed under PD-44 zoning, whether for the subject site or for any of the surrounding residential properties, should they be rezoned to PD-44. *See id.* at 172-73. In his view, that was the point of recommending PD-44 zoning. Mr. Perrine was not aware of the size of the building footprint or the absolute height of the Estreicher residence, the

Wash residence, the Sunday house, the Fire and Rescue building or the office building diagonally across Old Georgetown Road on the south side of Glenbrook. *See id.* at 174-75. He stated that the office building is three stories as seen from Old Georgetown, the Estreicher home is two and a half stories and the others are two stories. Of the remaining houses in the Rugby/Glenbrook enclave behind the subject site, Mr. Perrine was not aware of how many are one and a half, two or two and half stories, although he testified that they were all in that range.

On re-direct, Mr. Perrine revisited the question of right-of-way line vs. curb line. He described the curb line as a physical line that exists right now on the road and is not proposed to be changed. Tr. 2-22-10 at 182. To him, it makes sense to measure the setback recommendation from that physical line, because the intention was to create a building plane. The right-of-way line, in contrast, may jog back and forth. The curb line stays the same no matter what the right-of-way line does, and therefore it deals more with the urban form.

Mr. Perrine noted that the PD Zone does not prescribe minimum setbacks, nor does it have a height limit, but if those features are established as binding elements of the development plan, they set the setbacks and the height. If those elements are not established at the rezoning phase, they must be set at site plan approval.

Mr. Perrine added a third reason why the 100-foot setback of Section 59-C-7.15 does not apply: the adjoining properties are recommended in the Sector Plan for the PD zone, not a single-family residential zone. *See id.* at 185.

Mr. Perrine addressed the Sector Plan height limit map's designation of a 35-foot height limit on parts of the subject property, noting that 35 feet is the height limit in the R-60 Zone. In his view, a 35-foot height limit would be inappropriate and unusable in the PD Zone.

Turning to the site conditions, Mr. Perrine observed that much of the site is currently covered with impervious surfaces due to the extensive parking lots. Taking into account building footprints and

asphalt, the proposed development would result in an increase in paved area of only 1,333 square feet. *See id.* at 186. The property is currently about half ground-level green space and will still be about half ground-level green space if the proposed development goes forward.

3. Edward Wallington, civil engineer. Tr. 2-22-10 at 191-240; Tr. 2-23-10 at 75-93.

Mr. Wallington was qualified as an expert in civil engineering during the first hearing in this matter. His firm prepared the original development plan and the revised plan on remand.

Mr. Wallington used Exhibit 382(r) to show that the existing right-of-way for Old Georgetown Road is 70 feet wide and the pavement is 55 feet wide. The distance from the center line is 27 ½ feet to the curb line and 35 feet to the right-of-way line, so the curb line is 7 ½ feet from the right-of-way line (rounded up in others' testimony to eight feet). Mr. Wallington noted that the Sector Plan calls for a right-of-way width of 100 feet, so the Applicant has been asked to dedicate an additional 15 feet along its road frontage to be used as sidewalk. *See* Tr. 2-22-10 at 193-94.

Mr. Wallington testified that if the project goes forward, the Applicant will seek to resubdivide the subject property into a single lot, including the land under the abandoned roadways. He noted that the density calculation has always been based on the land area including the abandoned roadways.

Mr. Wallington confirmed features of the existing site and the proposed development such as the walkway from Rugby Avenue to Glenbrook Road. He remarked that his firm discussed the proposed grass pavers with the department of Fire and Rescue about a year ago and they found it acceptable. *See id.* at 204-205.

Mr. Wallington stated that the forest conservation plan was updated to show the new plan, which provides a little more flexibility in where to locate the trees to meet forest conservation requirements and what types of trees they can use. He agreed with earlier testimony that the existing trees need to be removed due to their condition, noting that an application for a variance to permit removal of the specimen trees received no response and therefore was deemed approved. *See id.* at 207.

Turning to stormwater management, Mr. Wallington stated that the State of Maryland has adopted new regulations that take effect in May, 2010. As a result, the stormwater management concept plan that was approved some time ago will need to be updated to comply with the new regulations, once the County has finalized its version of the new regulations. Mr. Wallington described the State's new approach, which focuses on "environmental site design," a process that tries to capture run-off close to the source and get it into the ground as soon as possible, or to treat it and slow down the release rate. The idea, he explained, is not to allow storm-water to collect in large quantities and high velocities, but to keep it in small volumes with lower velocities. *See id.* at 211. This typically involves smaller stormwater management facilities such as biofilters, swales, green roofs and pervious paving, rather than large underground storage facilities. The previous plan for the subject property involved three or four underground vaults with controlled rates of release. Mr. Wallington anticipates that the new plan will center on a green roof, porous pavers, stone trenches and at least one biofilter in the green area. *See id.* at 213-215. A biofilter is a depressed planting area that water drains into, where the water is filtered and slowly released through underdrains into the storm drain system. It serves as both a stormwater management facility and an aesthetic feature. Mr. Wallington is positive that the subject site can satisfy the new stormwater management requirements, to the extent they had been defined at the time of the hearing. *See id.* at 216. He suggested that the option for a partial quantity waiver should be left open, nonetheless, because sometimes in an urban area Technical Staff prefers to grant a partial waiver and use the associated fee for a stream restoration project that will have a wider benefit in an urban area where many properties don't have any stormwater management. *See id.* at 217-18. Mr. Wallington opined that none of the anticipated stormwater management features would have any impact on the site layout.

Mr. Wallington testified that nothing in the revised plan affects his prior opinion that the project would be adequately served by public facilities including roads, sewer, water and utilities. *See id.* at 218-19. He does not expect the project to have any adverse impacts, but rather to upgrade several of these

features, particularly stormwater management. He noted that the new site layout still provides adequate access for emergency vehicles through the site between Rugby and Old Georgetown. *See id.* at 220-21.

On cross-examination, Mr. Wallington acknowledged that putting a bio-filter in the grassy area behind the proposed building would limit the functionality of that area as a recreation space. Instead of being a flat, grassy area it would be depressed, planted area that is damp for several hours after a rain. *See id.* at 223. He stressed that none of the details of the new plan have been worked out, and that the several possibilities he identified are options to be considered.

Mr. Brown questioned Mr. Wallington about the derivation of some of the numbers on Exhibit 382(b), starting with the building footprint number of 15,756 square feet. Mr. Wallington testified that the numbers were calculated by highlighting the building footprints on the site survey and computing the area electronically. *See id.* at 224-25. For the floor area of the existing buildings, Mr. Wallington contacted church representatives who provided information on how much usable space is in each of the buildings.

Mr. Wallington identified Technical Staff as his source for his understanding that the master plan-recommended right-of-way for Old Georgetown Road is 100 feet. *See id.* at 224. On re-direct, he noted that the 1994 Bethesda CBD Sector Plan calls for a 100-foot right-of-way for Old Georgetown Road adjacent to the subject property. *See id.*, citing Bethesda CBD Sector Plan at 173. He conceded on further cross-examination that he got his information about the recommended right-of-way width from Technical Staff. On closer examination of the page referred to in the Bethesda CBD Sector Plan, Mr. Wallington agreed that the portion of Old Georgetown Road in front of the subject property appeared to be mostly outside the area covered by the plan. *See id.* at 229-30. He noted, however, that there was a note suggesting a 100-foot dedication, pointing to a dashed line that suggests a sliver of additional dedication that would be within the sector plan boundary. *See id.* at 230-31.

Mr. Brown asked Mr. Wallington to examine a page from the 1990 Bethesda-Chevy Chase

Master Plan, which he considers the applicable master plan because, in his view, the Bethesda CBD Sector Plan area does not include this section of Old Georgetown Road. *See id.* at 238. Mr. Wallington, reading the document for the first time, acknowledged that it recommended a 120-foot right-of-way for Old Georgetown Road. *See id.* at 238.

On redirect, Mr. Wallington provided back-up data to support his calculations of existing and proposed square footage numbers. *See* Tr. 2-23-10 at 75. He presented a worksheet on which a computer program was used to compute the areas of various elements of the existing site, as well as a document summarizing calculations his firm made of the impervious area occupied by the existing buildings and vehicular pavement areas.²⁵ *See id.* at 76-78, Exs. 405 and 406. The latter shows calculations for the square footage of each of the four existing houses, the sanctuary building including a small loft and a one-level connector to the community center, and the community center itself. These calculations, Mr. Wallington explained, were based on information from church staff about how many levels each building has, allowing him to calculate the building footprint as 15,756 square feet and the total usable square footage as 36,630 square feet. Mr. Wallington added to the building footprint a figure calculated for the vehicular pavement on the site, 22,410 square feet, to reach a total of 44,166 square feet of building footprint and vehicular pavement. *See* Tr. 2-23-10 at 80-81.

Mr. Wallington also submitted a Fire Department Access Plan, Exhibit 407, which was first prepared at the time of the original application or shortly thereafter to reach a conceptual agreement with Fire and Rescue Department staff for emergency access. *See* Tr. 2-23-10 at 86. The exhibit demonstrates how a fire truck could get to the site and leave without having to make multiple turns, recognizing that the turning radius of the Rugby Avenue cul-de-sac is too small for a fire truck. The route identified involves using a through movement from Rugby Avenue to Old Georgetown Road, starting from the cul-

²⁵ Mr. Wallington testified that the calculations shown on Exhibit 406 were made in December, but he re-wrote them from a rougher version the night of the first remand hearing, so that he could bring document with more clarity to the second remand hearing. *See* Tr. 2-23-10 at 82.

de-sac on Rugby and driving over the grass pavers to the driveway that extends to Old Georgetown. *See id.* at 87. The original drawing was then updated to reflect the revised development plan, but the concept that Fire and Rescue Staff found acceptable a year ago has not changed. *See id.* at 87-88. The drawing also shows that the fire truck could come down Glenbrook and turn into the site driveway if it needed to reach that part of the site.

On cross-examination concerning his square footage calculations, Mr. Wallington noted that the church square footage includes a small loft and a basement level that meets the definition of usable space. *See* Tr. 2-23-10 at 90-91. He stated that the calculation of internal space was provided by the architect, but he is “quite confident” that it does not include a square footage figure attributed to the open space above the sanctuary, because counting empty space as square footage would be inconsistent with customary practice. Mr. Wallington emphasized that only usable floor area is counted as square footage. *See id.* at 91. Mr. Wallington stated that the square footage calculations for the proposed buildings were all provided by the architect. He did, however, point to figures on Exhibit 382(b): 175,000 square feet of floor area for the residential building and 53,000 for the church/community center. He was unable to say whether anything in the record breaks down the figure of 35,220 for the proposed total building footprint into the residential building and the church/community center.

4. Michael Lenhart, transportation planner. Tr. 2-22-10 at 244-259.

Mr. Lenhart was qualified as an expert in transportation planning and traffic engineering during the original hearing in this matter. He testified that the proposal on remand is no different from a traffic perspective: same land uses, same quantities, same trip generation. Mr. Lenhart confirmed his opinion that the level of transportation services is adequate and would be so with the proposed development, “well within the adequacy standards.” *See id.* at 245.

Mr. Lenhart stated that there had been no change in the circulation pattern, relying on a 2007 Staff Report which stated that there would be no access from Rugby. *See id.* at 246. When the Hearing

Examiner pointed out that her report stated to the contrary, that Rugby was to be a secondary access point for residents of the multi-family building, Mr. Lenhart pointed out that the use of Rugby changed several times during the course of the approval process, and he was under the impression that at the end, the Rugby access had been eliminated. Applicant's counsel interjected that if the Rugby access had been eliminated, he was unaware of it, but even if there were some trips accessing from Rugby, it would not change the analysis.²⁶ *See id.* at 248-49. Mr. Lenhart testified that when the plan did include a Rugby Avenue access point, his firm had assigned to Rugby no traffic from the church, community center or day care center, and only four residential trips (two in, two out) during the peak hours. *See id.* at 247. He considers this a de minimis impact on Rugby Avenue. Mr. Lenhart opined that without a Rugby Avenue entrance, that traffic would use the Glenbrook Road entrance, since the drivers would likely be coming from that direction. *See id.* at 249.

Mr. Lenhart observed that since the first hearing in this case, the county has adopted a new Policy Area Mobility Review test, known as PAMR. In the Bethesda policy area, PAMR requires mitigation of 30 percent of a project's traffic impacts by making non-roadway transportation improvements. In this case, the Applicant can achieve nearly all its mitigation by contributing to the Bethesda parking district organization (a contribution it would be required to make even without PAMR due to the location of the subject property within the Bethesda CBD policy area). *See id.* at 251. The Applicant will be required to mitigate two more trips if the project goes forward. Mr. Lenhart suggested that this could be done through a mitigation payment in lieu, or perhaps through a credit for the sidewalk proposed in front of the site. He sees no difficulty in finding a means to accomplish the necessary mitigation.

Turning to the recommended right-of-way for Old Georgetown Road, Mr. Lenhart opined that the sector plan line shown in the 1994 Bethesda CBD Sector Plan runs along the north side of Old

²⁶ There was considerable confusion at the hearing regarding Rugby Avenue access. To clear up that confusion, Applicant added Binding Element #9 to the development plan, after the hearing, which provides, "Except for emergency vehicles, no direct vehicular access from Rugby Road [*sic*] is permitted through the property." Exhibit 417(a).

Georgetown Road and does not encompass the roadway itself. *See id.* at 254. He argued, however, that this does not mean the roadway was not included as part of the master plan. He stated that when two policy areas abut each other, usually there is a line going down the middle of the roadway. If roadway frontage abuts both policy areas and they have different requirements, in Mr. Lenhart's view the master plan with a higher congestion area threshold governs. *See id.* at 254-55. Mr. Lenhart presented an e-mail from a member of Transportation Planning Staff at the MNCPPC, Ed Axler, to support his position that in Staff's view, the right-of-way recommended in the 1994 plan covers the entire roadway of Old Georgetown Road along the subject site, although Mr. Brown considered the e-mail irrelevant and unpersuasive. *See id.* at 256, citing Ex. 399.

5. Marvin Tollefson, pastor, Christ Lutheran Church. Tr. 2-23-10 at 22-66.

Reverend Tollefson has been the pastor at the church for more than 26 years. He testified that following the remand, the church embarked on a process of deciding how to respond to the direction in the Hearing Examiner's report and from the County Council. At the conclusion of that process, they ended up with a unanimous decision from the legislative board and council who were charged with the responsibility for this endeavor to go forward with the proposal now before us. Being highly committed to the church's mission and to making its place in Bethesda work for the next 50 or 70 years, they decided that the church sanctuary would have to go, because its location made everything not work as well as if it were gone. *See* Tr. 2-23-20 at 24. He voiced some concern about church members who have been worshipping in that space or 35 or 40 years, but noted that they got a green light from members, and that the mission is always more important than the building.

Reverend Tollefson stated that he participated in the Sector Plan process, testifying before the County Council about "a two-pronged approach of successful redevelopment of the property and enhancing the current services." Tr. 2-23-10 at 25. His understanding of the Council's intent was to recommend PD zoning as the best way to provide development flexibility for what the church proposed,

i.e., to expand the church mission at that location and also provide housing. *See id.* at 25-26, 57-58.

Reverend Tollefson submitted into the record an e-mail written during the Sector Plan process, describing the intended content of his testimony on the plan. *See id.* at 27; Ex. 402. He testified that he spoke in accordance with that e-mail.²⁷

Reverend Tollefson stated that the church has had a longstanding commitment to major effort in serving the community. In his 26 years in Bethesda, he has witnessed a pretty dynamic change in the community, with an increasing need for human services, mental health services, recreational facilities for youth and seniors, and help for people who don't speak English. *See* Tr. 2-23-10 at 34-35. With the recent economic downturn, the church has seen even more of an increase in the number of people coming for help with all kinds of basic needs. Reverend Tollefson explained that the church provides services the County can't and doesn't, such as mental health services and support programs.

Reverend Tollefson testified that the church intends for residents and church occupants to access and use all of the facilities and services connected with the project. He expects to work out an arrangement with residents of the new building and the larger community to make all of the facilities available to the community under a management agreement. Finally, Reverend Tollefson pledged the church's commitment to adhere to the written binding elements of the development plan, including the additional ones agreed to during the hearing. *See id.* at 37.

Under cross-examination, Reverend Tollefson acknowledged that the e-mail about his Sector Plan testimony proposed a recommendation of the PD-68, which would allow 68 units for each of the two acres of site area. He did not recall whether it was Bozzuto Homes (with which the church was then in a joint venture to develop the property) that suggested PD-68, having not been involved at that level of detail. *See id.* at 39-40.

²⁷ The e-mail was admitted over Mr. Brown's objection. Mr. Brown noted that the e-mail was nothing but an e-mail from Reverend Tollefson to himself at a different e-mail address, and that the best evidence of his testimony before the Council would be the testimony itself. Mr. Kaufman acknowledged that one could get the whole transcript from that time, but argued that the e-mail identified as Exhibit 402 was still relevant.

Reverend Tollefson testified that the church considered all the possibilities after the remand, but quickly concluded that the best way to make a sizable change was to remove the sanctuary. It was very important to the church to make a contribution to the housing needs in the local community, including some affordable units. It was also important to have something that works in terms of the whole package – economics, greenness, ability to serve people. *See id.* at 42. Reverend Tollefson observed that it does take economics to be able to deliver services.

In response to a question from the Hearing Examiner, Reverend Tollefson referred to a diagram showing the uses proposed on each floor of the new church/community center building. *See id.* at 44-49; Ex. 403. The ground floor would have a lobby and the day care center. The next level would hold the two-level church sanctuary, church offices, classrooms and a balcony. Above that would be offices for non-profit groups, and above that a two-level multi-purpose social/recreational/assembly space that may be used for senior or youth programs, community theater, music, etc. The multi-purpose space would be built on a basketball court design that qualifies for the local youth league, but is not a full court. Reverend Tollefson also submitted a potential schedule for the use of the space, as well as a document listing the existing programs in the church's current space. *See* Tr. 2-23-10 at 49-50; Exs. 404(a) and (b).

Reverend Tollefson stated that the new worship space would have about 300 seats compared to 400 in the existing sanctuary. He said that would make things much more efficient, because the current trend in most religious communities is to have more and varied worship events. The proposed space will allow more worship services to take place while education is going on, with no interference. *See* Tr. 2-23-10 at 59. The current layout makes that very difficult.

Reverend Tollefson agreed with Mr. Brown that between the two-story worship space and the two-story multi-purpose space, the proposed church/community center would have an entire floor's worth of open space. He did not know whether the square footage figures counts those open space areas. *See id.* at 62.

6. Melanie Folstad, Chevy Chase resident, in support. Tr. 2-22-10 at 279-283.

Ms. Folstad has lived in the area for about 20 years, the last 17 “very close to where the church is located.”²⁸ Tr. 2-22-10 at 280. She has served on the County Recreation Board and the Western Montgomery Citizens Advisory Board, and is currently president of her local neighborhood association (Chevy Chase West) and on the board of directors of the Bethesda-Chevy Chase Chamber of Commerce. She is also the mother of three children who went through the child care center and who are now 13, 14 and 15 and “desperately looking for community space in Bethesda-Chevy Chase where they can play and use facilities.” Tr. 2-22-10 at 280. Ms. Folstad also chairs the senior focus group at the Chamber of Commerce, and recognizes the need for space for people of older generations, which she finds Bethesda-Chevy Chase sorely lacks. As a result of these interests, Ms. Folstad supports the present application. She considers it compatible with the surrounding community, stating that what is unique about Bethesda is its ability to really meet multiple needs, as the church is trying to do.

Ms. Folstad noted that her neighborhood is wedged between a lot of developed space, and she finds that the positives from that far outweigh the negatives, although there are some voids in services that the church can help fill. She considers the size and scale of the proposed project compatible with single-family residential uses in the Bethesda area.

B. Post-Remand Opposition

1. Stephen Teitelbaum, Battery Park resident. Tr. 2-22-10 at 260-275.

Mr. Teitelbaum is a Battery Park resident, a member of the Battery Park Citizens Association and its immediate past president. He offered into the record a lengthy resolution adopted by the Association in opposition to the present project, and testified on its behalf. *See* Ex. 400. Battery Park is the neighborhood on the south side of Old Georgetown Road immediately opposite the subject site. Mr. Teitelbaum described it as “the neighborhood that is to be protected via the compatibility requirement in

²⁸ Ms. Folstad’s address (4620 Hunt Avenue, Chevy Chase, Maryland) is actually about two miles from the church.

the sector plan that anticipates a possible rezoning of the site.” Tr. 2-22-10 at 261.

Mr. Teitelbaum lives five houses down from the church on Exeter Road, which merges into Glenbrook Road a few feet from Glenbrook’s intersection with Old Georgetown Road. He stated that the church property is clearly visible from his home.

Mr. Teitelbaum described some frustration expressed by the Planning Board, during its review of the present proposal, as to whether the PD-44 was the best choice for a zoning category. He stated that at least one member expressed the sentiment that the Applicant had done as well as could be expected under the circumstances. In Mr. Teitelbaum’s view, however, the standard for this rezoning is not whether the Applicant has done its best, but whether the proposed development is compatible with single-family residences on both sides of Old Georgetown Road and does not isolate any residences. *See id.* at 263. In his view, the question is also not whether the present proposal is more compatible than the first one, just whether it is compatible.

Mr. Teitelbaum argued that as seen from Battery Park, minor changes in materials, window treatments and height do not solve the threshold compatibility problem, they “only evidence how truly impoverished the original proposal was.” *Id.* at 264. He stated that the Battery Park Citizen’s Association does not consider the present proposal compatible with the residential character of Battery Park, and in fact considers it worse than the original plan. Mr. Teitelbaum described the present proposal, in which each building has a larger gross square footage than the entire gross square footage presently on the site, as an attempt to extend the Bethesda CBD by one more block into a residential neighborhood. He described the threshold problems thus: the scale, scope and use of this proposal are out of keeping with nearby buildings, except for the “architectural white elephant” across Glenbrook Road from the subject site. *Id.* at 265. He noted that this building is within the Bethesda CBD, and even so, it would not be permitted there today, although a better sited building with comparable height would be allowed. In his view, that planning mistake does not justify another one. Mr. Teitelbaum also

considers the tall buildings along Battery lane inapplicable comparisons, as they are located hundreds of feet from Old Georgetown Road, heavily screened from the road by trees.

Mr. Teitelbaum argued that the present proposal is worse than the first one for two reasons. First, the church and steeple would be demolished, removing a landmark building that, in Mr. Teitelbaum's view, provides a gateway to the Bethesda CBD while remaining compatible in scale, height and materials with the neighboring residential community. Rather than framing the Bethesda skyline like the steeple currently does, Mr. Teitelbaum argued that the new buildings would block it. *See id.* at 267. Second, he contended, the massing of the new multi-family building has been pushed closer to Old Georgetown Road and Battery Park. Previously, at least the multi-family building wrapped around the church and was partially hidden from Battery Park. Now, Mr. Teitelbaum anticipates a 285-foot-long building at a height of 102 feet (94 feet plus the eight-foot terrace) staring directly at his neighborhood across the street. He stated that while the residential building is proposed to be 12 feet lower, the church/community center building is two feet higher, and they will no longer be separated by the church sanctuary, making their visual effect massive. *See id.* at 268. He objects strongly to the idea of a "wall of buildings across the street nearly as high as the current steeple." *Id.*

Mr. Teitelbaum argued that the proposed project violates the "tenting" principal of the Sector Plan, which calls for decreasing building heights moving from the Metro to the edges of the planning area. He related that the Planning Board said, during its consideration of the matter, that tenting is not necessary on this site because Old Georgetown Road is wide enough to provide a visual separation. *See id.* at 269. Mr. Teitelbaum noted that tenting has been applied along Arlington Road in downtown Bethesda, where it abuts the Edgemoor neighborhood, even though Arlington Road is only one lane narrower than Old Georgetown Road, and even though the Edgemoor neighborhood is shielded from the high-rise side of Arlington by the low-rise library and elementary school, as well as a park along the residential perimeter.

Mr. Teitelbaum raised four “technical zoning requirements” whose satisfaction he believes is in doubt:

1. Whether setbacks should be measured from the curb or the right-of-way line.
2. Whether a 35-foot height recommendation applies to the rear part of the site. The map, he suggests, says yes.
3. Whether a private green roof counts toward satisfaction of an open space requirement.
4. Whether the Zoning Ordinance allows recreational facilities on site in the community center.

Mr. Teitelbaum represents that per Section 59-C-7.133(a), noncommercial community residential facilities may be permitted on the site only if they are for the benefit of residents and their guests, which the proposed church/community center clearly is not.

Finally, Mr. Teitelbaum stated that it is awkward to argue against the church, but even if its project is in the public good, that does not create a presumption that it should be allowed. He argued, moreover, that the social goals that would purportedly be achieved are vague, solely in the church’s discretion, and could change over time. The church’s goals would be, in Mr. Teitelbaum’s view, of no material benefit to Battery Park or any other residential community in the immediate vicinity. He argued that most of the services the new facility would provide that benefit Battery Park, such as the day care center, are already provided in the existing facility, or could presumably be provided in more modest facilities than those now proposed. *See id.* at 272. His community is also concerned about additional cut-through traffic on their streets, and other deleterious impacts such as increased street parking on their narrow streets.

2. Herbert Estreicher, adjoining property owner and resident. Tr. 2-23-10 at 6-22.

Mr. Estreicher owns and lives in the Glenbrook Road home that has the distinction of abutting the subject property both to the rear and to the side. He is represented by David Brown both individually and as a member of the Concerned Citizens of Glenbrook and Rugby.

Mr. Estreicher argued that the current Staff Report is entitled to no deference, because the Staff assessed compatibility by comparing the new plan to the old one, rather than by evaluating the new plan on its own merits. He described a number of aspects of the Planning Board's deliberations on this matter (Tr. 2-23-10 at 8-10):

- Commissioner Presley's strong dissent, based on lack of compatibility due to the mass, bulk and scale of the project and the Sector Plan recommendation to protect the neighborhoods on both sides of Old Georgetown Road.
- Commissioner Alfandre's remarks indicating that although he voted to recommend approval, he had strong reservations about the plan and expected a significant amount of work to take place at site plan to ensure compatibility. He did not say that the plan is compatible, but that it could be compatible.
- Mr. Kaufman informed the Planning Board that Technical Staff was aware of all of the opposition's arguments, but in fact Staff declined Mr. Brown's offer to read his written testimony in advance of the Planning Board's hearing, on grounds that they knew he was opposed and the Staff was in favor, so there was no need to see those papers. As a result, Staff's analysis did not benefit from the arguments and facts that Mr. Brown presented.

Mr. Estreicher described the present plan as an elephant that's been turned around with its front towards Old Georgetown Road instead of towards the Glenbrook and Rugby homes. *See id.* at 10. The plan proposes a nine-story building and a six/seven story building with no break in between. In his view, the plan would be better if one wing were removed from the residential building, allowing the church to remain. *See id.* at 10-11. He considers the mass, scale and bulk of the proposed development to horrendous, and out of place in this area. *See id.* at 13.

Mr. Estreicher questioned the reliability of Exhibit 82(r), which in his view appears to depict the proposed seven and nine-story buildings rising to only the third floor of the eleven-story building located

across Glenbrook Road from the site. *See id.* at 13-14. He suggested that Exhibit 393 provides a more true perspective, showing an 11-story building that appears to be two stories taller than the proposed nine-story building.

Mr. Estreicher contends that living in an urban area should not mean that he and his neighbors end up in a valley rimmed by high-rises. He noted that many of the homes on Glenbrook and Rugby are newly built or refurbished, and represent substantial investments for their owners. He does not consider it an acceptable trade-off for living in Bethesda to be hemmed in by a 280-foot monolith. *See id.* at 16. He argued that the proposed plan violates the Sector Plan's tenting principle, given that many of the structures on both sides of Old Georgetown Road to the south, all the way to the Metro, are three and four stories high. *See id.* at 16-17. Mr. Estreicher maintained that the proposed development would also isolate the neighborhoods on both sides of Old Georgetown Road.

Mr. Estreicher suggested that much of the testimony presented by land planning expert Kenneth Doggett during the first hearing, on behalf of the opposition, is still germane.²⁹ *See id.* at 17. He referred to the summary of Mr. Doggett's testimony and findings in the original Hearing Examiner's Report and Recommendation in this matter: pages 120 and 121, stating that Mr. Doggett talked about a reasonable transition between the single-family homes and a high-rise building; described the Rugby/Glenbrook homes and Battery Park as stable neighborhoods that should not be permitted to deteriorate; argued that a PD-44 development could coexist with the nearby homes if it were done at a different scale; argued that the proposed development would isolate the houses on Rugby and Glenbrook; noted that the existing larger buildings on Battery Lane are well-screened except for the fire station; and suggested that without the church and community center, 107 dwelling units could be laid out on the site quite reasonably. *See id.* at 18-19, 20-21. Mr. Estreicher argued that the fact that the opposition did not bring in experts for the second hearing is not grounds for approval.

²⁹ Mr. Estreicher stated that the neighbors could not afford to pay experts "to say the same thing over and over" but tried to do something that makes sense by having experts in the first hearing. *See* Tr. 2-23-10 at 17-18.

Addressing the specifics of the new church/community center proposal, Mr. Estreicher conceded that unlike the original proposal, with this plan he would still be able to see the sky from the side of his house. He does not feel that this, by itself, makes the plan compatible. *See id.* at 20.

3. Jim Humphrey, Montgomery County Civic Federation. Tr. 2-23-10 at 95-113

Mr. Humphrey testified, as in the first set of hearings, as Chair of the Montgomery County Civic Federation Land Use Committee. He explained that the Civic Federation's involvement in this case stemmed from its longstanding position in support of compliance with master plans, as well as the language of the Zoning Ordinance. *See* Tr. 2-23-10 at 95.

Mr. Humphrey noted that in order to support approval of the development plan in this case, the District Council must make a finding of substantial compliance with the Sector Plan. He added that a determination of compatibility with the surrounding neighborhood is key to making that finding. He emphasized that language from the Sector Plan, the PD Zone and the findings necessary to support approval of a development plan all reinforce the need to ensure the compatibility of this project with nearby land uses, citing the following (*see id.* at 96-97):

- One of the purposes of the PD Zone is “to ensure compatibility and coordination of each development with existing and proposed surrounding land uses.”
- The first paragraph of the PD Zone purpose clause states that “It is intended that the planned development zone category be utilized to implement the general plan, the area master plans and other pertinent County policies in a manner and to a degree more closely compatible with said County plans and policies than may be possible under other zoning categories.”
- The Sector Plan includes a specific compatibility recommendation for this site: “At the time of re-zoning, any application should be reviewed to determine compatibility with existing single-family homes, both north and south of Old Georgetown Road.”

- Under Section 59-D-1.61(b) of the Zoning Ordinance, a development plan may be approved only if the District Council finds that the proposed development “would be compatible with adjacent development.”

Mr. Humphrey argued that the proposed development fails to comply with the recommendations of the Sector Plan on three critical points, as discussed below.

1. Failure to show compatibility with the existing single-family homes both north and south of Old Georgetown Road. Mr. Humphrey quoted from the December 2008 Hearing Examiner’s report in this case, which found that the original design “would be incompatible with nearby single-family homes due to the height, bulk and setbacks of the proposed buildings.” 12/15/08 Hearing Examiner Report, p. 137. He conceded that the current layout has greater setbacks from the nearest Glenbrook and Rugby homes, but stated that compatibility involves more than that. In Mr. Humphrey’s view, compatibility is little improved in the revised plan, with the eight-story residential building lowered by 12 feet, but the church/community center building increased in height by two feet. Moreover, the bulk of the proposed buildings is, to him, the factor that renders the redesign even more incompatible with the surrounding neighborhood than the original, especially from the perspective of the homes to the south, across Old Georgetown Road and outside the sector plan area.

Mr. Humphrey observed that the original plan proposed a project that was broken into three elements “spaced out” along Old Georgetown Road, a new community center building, the existing church and a wing of the proposed residential building. This layout, in his view, alleviated the impact of the project’s bulk as seen from Old Georgetown Road. He considers the current design to be a single structure, barely perceptible as two buildings, which is 285 feet long and has a height ranging from 102 feet above the street for the residential portion, to 85 feet above the street from the ridge line of the proposed church/community center. Mr. Humphrey maintained that the recessed portion of the

residential building does little or nothing to mitigate the visual impact “of the sizeable bulk of this project.” Tr. 2-23-10 at 99.

Mr. Humphrey noted that the R-60 Zone allowed a building height of 35 feet to the midpoint of a sloped roof, and then the standard was lowered to 30 feet for newly constructed homes. He stated that this resulted in an absolute height of about 43 feet to the ridge line of these homes. Thus, the proposed buildings are two or more times the height of nearby homes. Mr. Humphrey also compared building footprint size in the R-60 Zone, which he estimated at about 2,100 square feet (minimum 6,000 square foot lot size times 35% maximum lot coverage) with the footprint of the proposed project, 17 times greater at 35,220 square feet.

2. Failure to comply with the 35-foot height limit recommended in the Sector Plan for the church-owned R-60 lot on the west side of Glenbrook Road, next door to Mr. Estreicher’s house. *See id.* at 101-102. Mr. Humphrey finds that this height recommendation is clearly indicated on the Sector Plan’s building height map, Sector Plan at 12. He stated that the Civic Federation agrees with Mr. Perrine that this lot was recommended for a 35-foot height limit because of the existing R-60 zoning, but he believes that the 35-foot limit was also intended to apply to the redevelopment of any of the lots for which it was recommended if redeveloped under the PD Zone. He sees the 35-foot height recommendation as reinforcing the Sector Plan’s call for a compatibility finding in the event of a rezoning. *See id.* at 102. Mr. Humphrey added that the project would also be incompatible with potential future land uses, if any of the residential lots that were rezoned to PD were redeveloped under the PD Zone within the recommended 35-foot height limit.

3. Inconsistency with the Sector Plan’s general recommendations for building heights decreasing from the CBD towards the residential edge, as stated in the Hearing Examiner’s report. Mr. Humphrey maintains that the Sector Plan not only calls for a step-down in height but assigns a 35-foot height limit for all properties on the residential edge in the sector plan area, except for four specific locations. *See id.*

at 103. On that point, Mr. Humphrey cited (and enclosed with his written testimony) his testimony on that issue from September 9, 2008, in which he listed Sector Plan height recommendations for properties that adjoin or confront single-family edge neighborhoods.

Mr. Humphrey stressed that the Sector Plan's guidance should be given great weight, not rationalized away, particularly in light of the language in the PD Zone stating that its purpose include implementing master plans more closely than is possible under other zoning categories. He quoted the December 2008 Hearing Examiner's report in this case, which stated that the homes on the south side of Old Georgetown Road "would face a high density development of massive, tightly spaced buildings that would completely block the view of the residential enclave behind them, severing the connection between the two residential areas," would "loom over the homes on Glenbrook Road and Rugby Avenue and would bring the height and density of the CBD past its borders right out to the edge of the Battery [Park] neighborhood." Tr. at 104, quoting Hearing Examiner's report. Mr. Humphrey considers these findings equally applicable to the present proposal. *See id.* at 105-106.

Mr. Humphrey added to his written statement a discussion of the uses permitted under the PD Zone. He noted that Code Section 59-C-7.133(b) states that any residential, noncommercial use may be permitted at the discretion of the District Council on a finding that it is compatible with the planned development and satisfies Section 59-C-7.15 (the compatibility standards). Mr. Humphrey stated that the Civic Federation supports religious institutions and appreciates this church's outreach activities, but stressed that finding the proposed use would be in the public interest must be in addition to the finding that it would be compatible, not instead. He noted that the church-related uses would occupy 53,000 square feet of the project, or about 495 square feet per residential unit. He compared this to the amount of commercial space anticipated in a PD Zone project, which is 10 square feet of gross floor area per residential unit in projects with more than 500 units, and 20 square feet per unit in projects with more than 1,000 units. *See* Tr. 2-23-10 at 108, citing Code Section 59-C-7.132. Mr. Humphrey contended that

the proposed plan is still trying to fit all of the church-related uses proposed originally onto the site, as well as 122 percent of the residential density recommended in the Sector Plan. He considers this simply too much for the space. *See id.* at 109. Squeezed onto the site as originally proposed it was incompatible with adjacent homes to the north; squeezed the other way it is incompatible with homes across Old Georgetown Road. Mr. Humphrey, on behalf of the Civic Federation, requests denial of this application.

PRE-REMAND TESTIMONY:³⁰

A. Pre-Remand Applicants' Case in Chief

1. Phil Perrine, land planner. Tr. June 2 at 21 – 160; June 6 at 221-26; June 24 at 12-27.

Mr. Perrine was designated an expert in land planning. He is personally familiar with the property in question, the rezoning request, the master plan and the requirements of the zone. *See* Tr. June 2 at 24.

Mr. Perrine outlined a suggested zoning neighborhood for this case, and described Technical Staff's somewhat larger neighborhood boundary as acceptable. *See id.* at 28. He then described current conditions on the subject property and nearby properties, and outlined the proposed development.

Mr. Perrine reviewed and analyzed the Sector Plan, noting that the existing zoning of the subject property, Glenbrook Road and Rugby Avenue is R-60, whereas the proposed zoning is PD-44. *Id.* at 48. Mr. Perrine emphasized the purpose of the Sector Plan, page 1, first paragraph to consider redevelopment that provides for more housing close to the Metro Station while retaining quality of life and ambience. The Council looked at increasing building height, recommending PD-44 for the subject property and recommending CBD-2 for other properties instead of CBD-1 to achieve the additional housing that was the essence of the Sector Plan. *Id.* at 49. Building height was increased from 50 feet

³⁰ The summary of pre-remand testimony is reproduced here, unedited, from the pre-remand Hearing Examiner's report of December 15, 2008.

to 90-143 feet in the area south and east of the Glenbrook/Rugby area while Georgetown Road maintained the 50 foot height limit for the first 60 feet back from the road. *Id.* at 50-51.

Mr. Perrine opined that the subject project conforms to these new specifications. Further, he maintained that the subject project does not isolate single family homes, as it is on the edge of the adjacent single family homes. Moreover, the single family homes would still have access to walkways to the park and roads further east. *Id.* at 51.

Mr. Perrine then discussed the compatibility of the proposed project with the surrounding area, focusing on five specific areas: (1) historical master plan recommendations; (2) the pattern of change that's occurred; (3) the current surrounding zoning pattern; (4) the surrounding land uses, and (5) the setting they have and a description of what is being proposed.

(1) Historical master plan recommendations: in the 1970 Master Plan, the subject property was recommended for residential, multi-family high-rise zoning, with 43 units to the acre. However, this was not implemented, thus the subject property remained R-60. *Id.* at 54. In a 1976 amendment, the subject property was still recommended for multi-family zoning, but that also was not implemented. The 1994 plan recommended continuing R-60 zoning for the site for two reasons: a higher density on the church site would be difficult due to the cost of structured parking, plus R-60 zoning would preserve some affordable single family homes. In fact, many homes near the subject property have been upgraded, and the neighborhood is not affordable. *Tr.* June 2 at 58-60. In the current Sector Plan the area is designated for PD-44, a similar density to the earlier multi-family recommendations.

(2) The pattern of change: The area has changed since the 1950's from a suburban area with a low level of development to a city living area with easy access to about 60 shops and 60 restaurants within a few blocks.

(3) Current surrounding zoning pattern: Small pockets of R-60 zoning are surrounded by multi-family housing, high-rise, and mid-rise zoning, with zoning that allows for 43 to 80 units per acre, and building height limits from 60 to 150 feet. Id. at 63.

(4) Surrounding land uses: Currently there are 2 to 11 story commercial use buildings, including a seven story parking garage, and a nine story residential building with retail on the first floor that has been approved on Auburn Street. There are single family residences along Glenbrook Road that back up to this approved development. The Rugby Avenue side of the subject property abuts a rescue squad building surrounded by surface parking. Mr. Perrine concludes that the area currently has a small enclave of single family residences along Glenbrook and Rugby, along with multi-family housing and the CBD, noting that the entire enclave is proposed for PD-44. There is more single-family housing along Old Georgetown Road, which is adjacent to the CBD. Id. at 67 - 70.

(5) Setting and proposal: Mr. Perrine described the urban setting around the subject property and adjacent residential enclave as the main amenities for these homes, more so than their backyards. In this setting he agrees with Planning Board Chairman Hanson that compatibility relies on the quality of design versus distance, together with below grade parking versus surface parking to mitigate visual, noise and activity impacts, relying on more attractive landscapes and screening walls, rather than having to utilize greater set-backs. Mr. Perrine further accentuates the beauty of the architecture, identifying quality materials, finishes and inviting windows along with a loading dock that was relocated to be further away from residences and screening walls being used for privacy. Mr. Perrine indicated that the Council's intent in the Sector Plan was to encourage housing and to maintain the unity of the remaining single family homes. The Council designated block 19 as PD-44, with basic parameters of compatibility for providing multi-family housing in close proximity to single family homes. Id. at 70-71.

Although block 19 is currently not fully utilized as PD-44, it has been recommended as appropriate for PD-44 use entirely. Mr. Perrine argues that what is proposed for the subject property does meet all the requirements of the Sector Plan and would be compatible with its surroundings. Further, Mr. Perrine points out that the development would retain a church in a CBD, and allow for community services and recreation programs plus 17 affordable housing units. This, he noted, is almost as many as the Council thought to preserve back in the 1994 Plan. He argued that reducing the building height would reduce space for church programs or for affordable housing *Id.* at 71.

When the Hearing Examiner asked Mr. Perrine how the Council should evaluate compatibility, given that the design elements are illustrative at the zoning stage, he suggested that the Council rely on the two-stage approval process established in the Zoning Ordinance, which requires the Planning Board to ensure compatibility at site plan. *Id.* at 71-73.

Mr. Perrine discussed the purpose clause for the PD Zone, which begins with implementation of the Sector Plan. He argued that the subject proposal is in compliance with the Sector Plan, and that PD-44 zoning allows better integration of the uses than under conventional zoning with separate setbacks. He reiterated that the plan satisfies the Sector Plan's height restrictions and basic goals, the multi-family housing does not isolate the single family housing and the project provides for the retention of the church and community center, which are all integrated with the below ground parking. Mr. Perrine stated that the church and community center provide for a maximum of social and community interaction and programs are accessible for all area residents and workers, not just for church goers. *Id.* at 75. He described the prominence of the church as providing a distinct visual identity, along with the architecture of the buildings framing the church. Mr. Perrine stated that the multi-family housing is consistent with the purpose clause because it provides for both market and MPDU units to balance nearby commercial facilities. *Id.* at 75. He discussed the use of green space, and to achieve that the surface parking was dropped below surface, making for useful open space, more appropriately located.

There will be a green roof that will provide more open space, and pedestrian walkways that link the open space areas. *Id.* at 76-77. He stated that automobile traffic will be minimized because there is a Metro station some 2500 feet away and a circulator bus is about one block away. *Id.* at 77.

Mr. Perrine noted that the purpose clause encourages large scale development and the subject property meets this requirement by assembling several lots and creating a comprehensive development of church, community building and mixed use residential properties. He states this is an efficient use of land, with 107 residential units, more than the minimum of 50 that the PD Zone calls for. *Id.* at 77. Mr. Perrine states that without this integration of church, community building and residential units, there would be a significant loss of programs and services which are amenities for the entire area. Further he described the subject proposal as safe and convenient, not only for its future residents, but for the local area residents as well. *Id.* at 78-79. He noted that the project includes separate pedestrian walkways and connections to nearby roads.

Mr. Perrine turned to the Zoning Ordinance, the standards for the PD Zone, and explained how the proposed development satisfies each one. He noted that the plan calls for more than 50 units, and meets density requirements. Mr. Perrine opined that the PD Zone's setback requirements do not apply to the subject property because it is in close proximity to a CBD.

Mr. Perrine opined that the impact on public facilities, schools, parks and recreation facilities will be minimal, and the subject development will enhance the area. There will be minimal impact on the local elementary, middle and high schools, as indicated by Montgomery County Public Schools. *Id.* at 82. Battery Lane Park is only one block from the subject property, and recreational facilities will also be located inside the residential building. *Id.* at 82.

Mr. Kaufman asked Mr. Perrine if any of the changes to the Development Plan have changed his analysis with regard to the appropriateness of the project. Mr. Perrine answered no. He opined that

the greater set-backs and repositioning of the loading area created a greater degree of compatibility for the proposed development. *Id.* at 83.

Mr. Perrine opined that the subject property satisfies the requirements of the purpose clause and development standards of PD-44; that the subject property is compatible with existing and planned land uses in the surrounding area; the PD-44 classification would be adequately served by public facilities, schools, parks and recreation; there would be no adverse effects upon health, safety, security, morals or the general welfare of the surrounding area; and there would be no detriment to peaceful enjoyment, value or development in the surrounding area. *Id.* at 83-85.

Mr. Brown began his cross examination of Mr. Perrine regarding the number and placement of trees on the subject property. Mr. Perrine agreed that the purpose clause calls for minimizing grading to make the best use of trees. In Mr. Perrine's view, however, there are not many trees to save here. Mr. Perrine stated that there are seven specimen trees that will be taken out and only two are in good condition. He notes that this is evident on the submitted conservation plan. *Id.* at 87-89

Mr. Perrine acknowledged that the property on Auburn Street where a nine-story building has been approved is the CBD Zone, a different zone from the subject property. *Id.* at 90.

Mr. Perrine explained that during a Planning Board meeting, the set-backs to the buildings next to the Wash property were changed from 8 to 15 feet to make the proposed buildings more compatible. *Id.* at 91-92. Mr. Brown suggested that if the building could be set-back 15 feet from 8 feet, then why not lower the building from 8 stories to 6 stories to make it more compatible. Mr. Perrine argued that it's not only height, but the entire project is a 'whole package,' including church activities and MPDUs, and that one aspect can not be singled out. *Id.* at 91 – 94.

Regarding the recommendations of the Sector Plan for building height and distance, Mr. Perrine stated that on Old Georgetown Road buildings can not be higher than 50 feet for a distance of 60 feet from the road. The new church community center will not be in compliance, as it is 76 feet in height at

52 feet from the road, and a portion will protrude 8 feet into the 60 foot restricted area. Mr. Perrine opined that this is acceptable given that the building will only be five stories tall, and would be well situated with respect to the church. *See id.* at 105-107. Mr. Perrine acknowledged that an area 8 feet high and 26 feet wide would cut into the setback area. He maintained that the 60-foot area in which the Sector Plan called for a 50 foot height limit should be measured from the curb, not the right-of-way, because the curb line is consistent along Old Georgetown Road, while the right-of-way line varies. *See id.* at 109-112.

Under questioning by a community member, Mr. Perrine opined that the interior courtyard/playground qualifies as green area because it is not so small as to not be valuable, and it is designed to be a courtyard, surrounded by buildings but accessible for people in the buildings. *See id.* at 123-124.

Mr. Perrine opined that the Old Georgetown entrance to the church and community building satisfy the Sector Plan's call for street-activating uses. (Mr. Humphrey argues that the 1994 plan's urban form section was not amended by the 2006 Woodmont Triangle Amendment.). *See id.* at 126-127.

Turning to the recommendation in the 1994 Sector Plan for building heights decreasing towards the residential edges of the Sector Plan area, Mr. Perrine acknowledged that the subject site is part of the residential edge, but opined that the proposed height would be compatible. He noted that nearby Battery Lane contains buildings up to 10 stories high that are outside the CBD. *Id.* at 128-29. He argued that compatibility depends on more than height, stressing the importance of articulated building walls and façade treatments to create a gradual transition. *Id.* at 130.

On re-direct, Mr. Perrine stated that there are other high rise buildings near single family homes, citing Local Map Amendment Case No. G-763, approved in October of 1998. Case No. G-763 was in the CBD and is located adjacent to single family homes on the south side of Montgomery Lane. *See id.*

at 135-136. Mr. Perrine made the point that this 10-story building is only 50 feet away from a single family home. There was also a nine story residential building recently approved by the homes on Glenbrook Road, just inside the CBD. *See id.* at 137-138.

Mr. Perrine stated that Technical Staff requested a right-of-way expansion to increase the size of the sidewalk, so that there would be continuity from the CBD area onto the subject property. This would make the sidewalk 15 feet wide versus the 6 foot width that is currently in place. This would change the right-of-way line, but not the curb line. *Id.* at 142-144.

Describing a single family home that is currently for sale, Mr. Perrine emphasized the neighborhood has had significant teardowns, renovations and expansions of existing homes. The home pointed out is listed for over \$1.2 million and advertises that it is in walking distance to the Bethesda Metro, shops, restaurants, Starbucks, the Trolley, etc. *Id.* at 144-145. This house is located next to the Wash house on Rugby Avenue. Mr. Perrine defined the differences between rural, suburban and city living, emphasizing compatibility for each setting: in a rural setting compatibility might rely on distance, in a suburban setting it might rely on a row of pine trees, and in an urban setting, it would rely more on a screen wall, a fence, design of the facility and putting some activities indoors. Mr. Perrine offers a comparison of the house for sale to the relatively modest single family homes that had been prevalent in the area. The house for sale is more representative of what the area has developed into, and not in the range of what is affordable by the median income earner. Mr. Perrine opines that the cost of this home for sale is due mainly to its renovations, location and convenience. *Id.* at 145-147.

In response to additional questions from Mr. Humphrey, Mr. Perrine acknowledged that the high rise he mentioned on Montgomery Lane next to a single-family home, known as the Edgemoor Condominiums, is also adjacent to another high rise, and is in an area that the 1994 Sector Plan recommended for a minimum density of 45 dwelling units per acre, with a maximum density of 100 units per acre and maximum height of 65 feet. *Id.* at 150-51. Mr Perrine agreed that the plan

anticipates high densities in the area of the Edgemoor Condominiums. He disagreed, however, with the proposition that the TS-R Zone and the PD-44 Zone are very different zoning categories, describing their densities as “not dissimilar,” and noting that both have compatibility requirements.

The Hearing Examiner asked Mr. Perrine to elaborate on a why the community center building is only 52 feet set-back from the curb, instead of 60 feet, per the Sector Plan. Mr. Perrine emphasized that the size of the building was designed to fit a junior varsity basketball court, and that the setbacks were designed to be in line with setbacks for other buildings and building faces that were already created, which included features of the church and the breezeway between the church and the community center. *Id.* at 155-156.

Mr. Perrine reviewed building heights along nearby streets, finding buildings with three to ten stories along Battery Lane; two, four and eight stories along Rugby Avenue; three, six, seven, ten and 14 stories as you get closer to Woodmont Avenue. *See* Tr. Sept. 24 at 14. He noted that south of Old Georgetown Road, is the Battery Park residential neighborhood, where buildings are much smaller, generally one and a half or two stories. He considers the five lanes of Old Georgetown Road to be a demarcation between the more urban Woodmont Triangle area and the residential Battery Park neighborhood. *See id.* at 15. Going back to the north side of Old Georgetown Road, Mr. Perrine noted that the smaller buildings are mostly older, and all of the buildings that he identified as approved but not yet built are taller. He considers this consistent with the Sector Plan, which relaxed height limits as one means of encouraging more housing in the area. *See id.* at 16. Mr. Perrine expects that buildings of greater height will continue to be approved in the Woodmont Triangle area. *See id.* at 18.

In response to questions from a community member, Mr. Perrine acknowledged that the 11-story building across Glenbrook Road was in the Old Georgetown Road Corridor District in the 1994 Sector Plan, whereas the subject property was in the Woodmont Triangle District. *See id.* at 25-25. He noted that the 11-story building was within the area covered by the 2006 Sector Plan amendment. He

also acknowledged that the taller buildings he identified north of Old Georgetown Road were not in the Woodmont Triangle District in the 1994 Sector Plan. *See id.* at 25-26.

2. Edward Wallington, civil engineer. Tr. June 2, 2008 at 161-193.

Mr. Wallington was designated an expert witness in civil engineering. He personally supervised work on the subject property, and has knowledge of the site, the surrounding area and the development standards requirements for the Zone. *See* Tr. June 2 at 161-162.

Mr. Wallington described the NRI/FSD, or Natural Resources Inventory and Forest Stand Delineation, which shows that the property has no forest, stream buffer, flood plain, conservation easement, or any type of natural features that would require specific setbacks. There are some specimen trees, but many are in poor condition and would not do well with a high density development. *Id.* at 164. Mr. Wallington stated that he and Technical Staff agreed that it would be better to remove the existing trees and plant new ones. *See id.* at 164-65. The Hearing Examiner notes that two trees had to be cut down during the pendency of this case due poor health.

Mr. Wallington used the forest conservation plan to demonstrate that forest conservation requirements would be met. He stated that because the subject property is already developed and has no forest, the only requirement is afforestation, which will be met on site. *See id.* at 166.

Mr. Wallington detailed the storm water management plan, noting that a concept plan was approved by the Department of Permitting Services. The plan consists of three sand filters that would collect runoff from vehicular and grassy areas, filter it and disperse it for eventual release into the storm drain system. Mr. Wallington observed that the green roof would assist in reducing the rate of storm water runoff by allowing the water to collect under the turf of the green roof, where it would be collard and filtered and eventually drain. *See id.* at 169. Because the runoff would be dispersed to different discharge points, each with a peak discharge under 2 CFS (cubic feet per second) no channel protection (quantity control) measures would be required. *See id.* at 170-171.

Mr. Wallington described the road abandonments Applicant have requested: 4,043 square feet for the Rugby Avenue piece and 1,300 square feet for the Glenbrook alley piece. *See id.* at 171. There is no indication of any public right-of-way that connects the proposed abandonment areas, which Mr. Wallington stated serve only the subject property. *See id.* at 172. He noted that the abandonments would require some adjustment to the sewer, water and power lines on the subject property, but will not affect any other property, except for a couple of hours of outage while being worked on. Mr. Wallington continued by stating that fire department access would be from the Rugby Avenue entrance, around the building to Old Georgetown Road. He stated that there would be signage and landscaping to indicate emergency vehicle use only, but the plans were changed later. *See id.* at 175-176; Lenhart testimony Sept. 9.

Mr. Wallington opined that the new cul-de-sac at the end of Rugby Avenue would provide a turn-around area for medium sized trucks, which currently they have to back out or use the church parking lot to turn around. Larger trucks would use the loading dock off of Glenbrook Road. Mr. Wallington suggested that the turnaround area on Rugby would benefit Rugby Avenue homes as well as the subject site. *See id.* at 177-179.

Mr. Wallington noted that adequate water and sewer services are available on Rugby, Old Georgetown and Glenbrook. *See id.* at 180.

Mr. Wallington opined that from a civil engineering standpoint, the proposed rezoning would serve the public interest, would be suitable for the subject property, would be compatible with the surrounding neighborhood, and would not cause adverse effects upon the health, safety, security, moral or general welfare of the general public. *See id.* at 181.

On cross-examination, Mr. Wallington stressed that green roofs are a significant priority throughout Montgomery County. He stated the concept of the green roof is a grassed turf condition with approximately 4-5 inches of soil underneath. *Id.* at 181-182. It can be for walking on, but is not

intended for recreational use, as the primary function is to hold, filter then drain storm water off the roof over a period of time, unlike current conventional roofs that dispense the storm water immediately. It would be soggy after rain or snow melt. *Id.* at 182. It is intended, Mr. Wallington explained, more for visual enjoyment and environmental benefits than for walking.

Mr. Wallington deferred specific questions about the site acreage to his surveyor, who testified at a later date.

3. Michael Foster, architect. Tr. June 2 at 194-243; Tr. June 6 at 55-128.

Mr. Foster was designated an expert witness in architecture and urban planning. He completed an architectural analysis and feasibility study for the proposed rezoning, taking into account the provisions of the Sector Plan and the PD-44 Zone. Mr. Foster is very familiar with the subject property, its application for re-zoning and the surrounding areas. *See* Tr. June 2 at 194-197.

Mr. Foster described the existing church as a mid- 20th century building that has been a landmark for some time for people coming in and out of the CBD. As a result, he stated, the plans leave a little bit of open space on both sides to set the church building apart a little bit. On one side that space is open to the street, providing pedestrian access to the building from Old Georgetown Road, and on the other side it is an enclosed courtyard intended for use by the child daycare center. Mr. Foster considers the site ideally located to take advantage of the transit-oriented and pedestrian friendly network of streets, neighborhoods, shops and restaurants that have developed in that part of Bethesda. Mr. Foster stated that the site is adjacent to an 11-story office building and more broadly surrounding by high-rise or higher-density residential structures. He also acknowledged that immediately to the north is “a marvelous pocket of single family residential neighbors,” stating that these buildings, together with the scale of houses across the street and the site location within walking distance to Metro and other community amenities, “certainly influenced the design decisions that have shaped this project.” Tr. June 2 at 200.

Mr. Foster displayed some confusion about the role of setbacks in this case. He stated that the proposed project would satisfy all required setbacks. When the Hearing Examiner pointed out that the PD Zone does not impose any setback requirements,³¹ Mr. Foster stated that the setbacks they worked with must have been the ones that apply under the current zoning. *See* Tr. June 2 at 201.

Mr. Foster noted the Sector Plan recommendation that no building should be taller than 50 feet within 60 feet of Old Georgetown Road, which he believes should be measured from the curb line. *See id.* at 201. He noted that the existing church satisfies that recommendation and its location would not change, but the community center building would be only 52 feet from the curb, rather than 60, at a point 50 feet above grade. He maintained that this intrusion into the recommended setback is necessary to provide enough space for a regulation-size intramural basketball court. *See id.* at 202.

Mr. Foster testified that the lay out was designed in a classical plan, with the church as the centerpiece, the community building on one side and the residential building on the other. He stated that the proposed residential building was shaped to minimize its mass along Old Georgetown Road, and was divided into two parts facing Rugby Avenue to break down its scale. He noted that entry courtyards on both the Rugby Avenue and Old Georgetown Road sides of the building would provide some visual relief and entry space on two sides of the building. Mr. Foster declared that although the church represents a miniscule percentage of the total square footage proposed for site, it is intended it to maintain a dominant aesthetic role, so his team used the cornice line of the church as a two-story base for the other buildings, repeating some of the architectural materials and treatments used on the church in those first two stories, then set the new buildings back above that point. In later testimony, Mr. Foster discussed an illustrative cross-section that shows the existing sanctuary, the preschool underneath it, with the adjoining daycare entry way connected to the courtyard and the day care center on the first floor of the new community center building. *See* Tr. June 6 at 62; Ex. 306. In the

³¹ With the exception of a 100-foot setback that does not apply in close proximity to a CBD.

community building, the second floor would connect into the church and consist of church offices and a library. The third floor would contain non-profit offices, and the fourth floor the multi-purpose room, housing the regulation basketball court, bathrooms, lockers, changing areas, a kitchenette for events and a spectator mezzanine. *See id.* at 62. Mr. Foster explained that the size of the gymnasium was established by the regulations for a junior high school basketball court, which is the minimum standard followed by the Fellowship of Christian Athletes, a community league. *See id.* at 71.

Mr. Foster testified that the residential building would have garage access with 196 spaces reserved for residents, and additional 62 for church and community building use. *See* Tr. June 6 at 63-64. In addition, the plans show two convenience spaces at grade for the residents, accessed from Rugby Avenue, and one drop off/convenience space in front of the community building, along Glenbrook Road. *See id.* at 63-64.

Mr. Foster noted that the proposed development would exceed the PD-Zone requirement for 50 percent of the site to be “green area” and reviewed in some detail a green area exhibit that was amended several times during the course of the hearing. He explained that the roof of the residential building would have green area in the form of a vegetative green roof that would contribute to storm water management, as well reducing the heat island effect of the building and providing attractive ground cover areas. The roof of the residential building would also have green area in the form of a lap pool, walkways, a cook-out pit, and two other open, community-governed areas for gatherings, all of which would be open to building residents. *See* Tr. June 2 at 206-07; Tr. June 6 at 75-76.

Mr. Foster described green area on the ground, consisting of two front courtyards, a back courtyard, walkways and landscaped setback areas along the site perimeter and near building entrances, and the day care center courtyard/playground. *See id.* at 215; Tr. June 6 at 78-79.

In later testimony explaining revisions to the green area exhibit, Mr. Foster testified that green area was calculated using the gross lot area of 87,417 square feet, which includes the two roadway areas

that are the subjects of the Applicant's abandonment requests, as well as the area of future dedication proposed along Old Georgetown Road. *See* Tr. June 6 at 72. Mr. Foster testified that he has had in-depth discussions with Technical Staff about the various green area components on the proposed Development Plan and their consistency with the green area definition. He acknowledged that the pool is intended for building residents and the courtyard/playground is intended for the day care center, and as such cannot be open to the public. Mr. Foster testified that in Technical Staff's view, these features qualify as green area. *See* Tr. June 6 at 79-80. On cross-examination, Mr. Foster conceded that the Zoning Ordinance definition does not limit the percentage of green area that may be located on a roof, so theoretically all of the green area could be on a roof. *See id.* at 85. He stated that in general, setback and building coverage requirements result in some green area necessarily being on the ground. Mr. Foster opined that while one could theoretically create a design that intentionally puts all the green area on the roof that is not typically how a reasonable architect designs a building and it certainly was not done that way in this case. *See* Tr. June 6 at 91-95.

Mr. Foster noted that the dominant ingress and egress for the residential building is off Old Georgetown Road and for the community/education building it would be off Glenbrook Road. *See* Tr. June 2 at 210-211. The garage would normally have two-way traffic, so that cars can access either Glenbrook or the driveway to Old Georgetown. During peak hours for drop-off/pick-up at the child day care center, however, garage traffic would flow one way, from west to east, obligating drivers to enter from Old Georgetown and exit on Glenbrook. *See id.* at 211, 221. Mr. Foster stated that parents would be expected to drive through the garage to a drop-off/pick-up point adjacent to the courtyard, and to remain in their cars while staff members help children in and out. He explained that the courtyard would be sunken below grade so that it can be accessed from the underground garage, noting that the underground approach to the day care center would allow cars to line up without adversely impacting the community by creating lines of cars in the street. *See id.* at 220.

Mr. Foster opined that the subject property is compatible with the residential areas along Rugby and Glenbrook. He noted that the Applicants propose to plant a vegetative screen along the north and east sides of the residential building, adjacent to the backs and sides of the closest single-family homes. *See* Tr. June 2 at 222-23. Mr. Foster reviewed the setbacks proposed between the closest homes and the proposed building, noting that the setback from the Wash residence, the closest home on Rugby Avenue, was increased from eight feet to 15 (and ultimately to 28 feet after Mr. Foster's initial testimony), based on concerns voiced by the Planning Board and neighbors. He stated that the increase in setback would reduce the noise coming from the subject property and make room for more landscaping to decrease visibility and noise. *See id.* at 216-217. He observed that the loading dock, which was originally planned for an above-ground location near the Glenbrook Road entrance to the garage, was moved inside the garage to reduce impacts on the neighbors, due to concerns raised by the community and Technical Staff. *See id.* at 217.

Mr. Foster stressed that the subject site is directly across the street from an 11-story office building. He noted that the proposed development would include widening the sidewalk along Old Georgetown Road from about six feet to 15 feet from the length of the property's frontage, installing streetscape treatments consistent with CBD standards and cleaning up the vegetation. He opined that these changes would create a better pedestrian experience and a more compatible use, considering the density and design character that are desired at this location. *See id.* at 227. Mr. Foster observed that the plans show an entrance to the site in front of the church with a double staircase, which "really engages the street." *See id.* at 233. From the top of the stairs, people would be able to turn right for the church/community center entry or left into the garden leading to the front entrance of the residential building.

Turning to the homes across Old Georgetown Road, Mr. Foster noted that the building proposed on the subject site would have greater setbacks and front yard areas than the neighboring houses, and a

front setback twice as deep as the 11-story office building across Glenbrook Road. He maintained that while the buildings across Old Georgetown are residential in appearance, half of them have commercial signs. *See id.* at 228. This statement contradicted Mr. Perrine's earlier testimony that the structures across the street are used as residences, and testimony by Opposition land planner Kenneth Doggett that there are no commercial signs among the buildings across from the site. Moreover, it was hotly contested by the president of the Battery Park Citizens Association, who testified that commercial signage is prohibited. *See* testimony of Sara Gilbertson.

Mr. Foster elaborated on the proposed setbacks, stating that from the face of the curb to the base of the residential building, the distance would be 43.5 feet, which would match the setback of 43.5 feet from the center of the existing church building. *See* Tr. June 6 at 69. He noted that the building would remain within the Sector Plan's recommended 50-foot height limit for the first 60 feet from Old Georgetown Road, measuring from the curb. *See id.* at 69-70. The taller stories would be set back farther from the street, with the building façade stepping back an additional eight feet above the second and fifth stories. *See* Tr. June 2 at 226-27. The proposed community center building would also be set back approximately 43.5 feet from the face of curb at its base. *See* Tr. June 6 at 71.

Mr. Foster described 'shadow' studies showing shadows the proposed buildings would cast on the neighboring properties at three different times of the year, on March 21st, June 21st and December 21st, at three times of day. Mr. Foster testified that the greatest shadow impact would be in the afternoons on all three days, when shadows would extend to the north, onto the nearest residential properties on both Rugby and Glenbrook. *See* Tr. June 2 at 235-36. During the winter months, when shadows are longest, Mr. Foster noted that the Estreicher home (closest to the site on Glenbrook) is already shadowed by the 11 story office building across Glenbrook. *See id.* at 237. By 3 in the afternoon during the winter, the buildings proposed on the subject site would cast shadows to the north and northeast, onto the residential buildings. Mr. Foster noted that because the sun keeps moving, it

does not hold any one shadow pattern for more than two hours, so any shadow impact would not last for more than about two hours. *See id.* at 238.

Mr. Foster offered his professional opinion, as an architect and urban designer, that the proposed re-zoning of the subject property to PD-44 is suitable, and that the proposed development would be an asset to the surrounding neighborhood. In his view, this neighborhood presents a wonderful opportunity for pedestrian-friendly smart growth, making the subject site a perfect location for additional housing density. He suggested that taking a surface parking lot and turning it into a more aesthetic, manicured, well detailed site would enhance the adjacent single-family neighborhood, and further opined that the proposed project would have no detrimental impact on the peaceful enjoyment, value or development of surrounding properties, or on the health, safety, security, morals or general welfare of the residents. *See id.* at 239-240.

Under cross-examination, Mr. Foster read into the record the fifth of eight urban form principles listed on page 40 of the 1994 Sector Plan: “Treat rooftops as sculptural elements that contribute to the visual interest of the skyline. Where appropriate, consider rooftops as usable outdoor space for recreational or commercial purposes.”³² Tr. June 6 at 96. He argued that the proposed development would promote the second sentence of that guideline by creating outdoor recreational space on the flat roof of the residential building. Mr. Foster maintained that the proposed development would be consistent with the first sentence of the guidelines because the composition of the buildings was “very intentionally designed to break down the scale of what is a massive CBD building” and to create visual interest. *Id.* at 96. He observed that visual interest would come from the streetscape, as well as from the sloped roofs that tie in with the church architectural form, and the three vertical elements that draw on the church steeple, stepping back to a flat roof for recreational purposes and, “to help that meet the sky,” a vaulted roof on the community center building. *See id.* at 96-97. Under further cross-

³² The quote has been shown correctly, rather than as misquoted in the transcript.

examination, Mr. Foster acknowledged that the church steeple would be less visible, with the new buildings in place, from any angle other than Old Georgetown Road.

Mr. Brown asked Mr. Foster to confirm certain calculations that Mr. Brown made, which were based on Mr. Brown's argument that the figure the Applicants have used for the gross tract area of the subject site should be increased by 7,750 square feet, to add back in a strip of land running through the middle of Old Georgetown Road; Mr. Brown contends that while this strip of land is part of Old Georgetown Road, the church was not paid for this land, therefore it should be considered part of the gross tract area. *See* Tr. June 6 at 100-107. Mr. Foster did not concede that this square footage should be included in the gross tract area. He agreed, however, that using Mr. Brown's larger gross tract area would require more green area to satisfy the 50 percent requirement, making the rooftop green area more critical. *See id.* at 108. Using the Applicant's number for gross tract area, 53 percent of the proposed rooftop green area would be necessary for the site to satisfy the 50 percent requirement, and the full amount of green area proposed would equal 57 percent of the land area of the site. Using Mr. Brown's number for gross tract area, 81 percent of the proposed rooftop green area would be necessary for the site to satisfy the 50 percent requirement, and the full amount of green area proposed would equal 52 percent of the land area of the site. *See id.*

On further cross-examination, Mr. Foster explained why the green area exhibit shows a front setback for the church of 43.5 feet, while Mr. Dye testified that the church's front setback as shown on the ALTA survey is 36.7 feet. *See* Tr. June 6 at 109. He agreed that front lot lines are defined by property lines, which do not change just because the curb lines for a street change. *See id.* at 113. Mr. Foster acknowledged that setbacks "for legal purposes" must satisfy the Zoning Ordinance, which measures setbacks from the property line, which is the same as the right-of-way line. *See id.* at 114. He stated that for planning purposes, including master plans, a setback from a road can be measured from the curb line, rather than the right-of-way line. *See id.* at 115-116.

Cross-examination then turned to the layout of the underground garage. Mr. Foster stated that he was involved in a collaborative design effort for the garage. To explain how the loading dock would work, Mr. Foster stated that a truck would enter from Glenbrook Road and back into the loading area, following a schedule that would reserve this area for day care center use during peak drop-off/pick-up hours. *See* Tr. June 6 at 171. When the loading dock is being used, for instance for trash pick-up, access to the garage would be limited to the driveway off of Old Georgetown Road. *See id.* Mr. Foster observed that for a residential building of the size proposed here, there would typically be only one garage entrance. Two entrances are proposed here, partly to allow an interior drive-through for day care customers. *See id.* at 171-72. Mr. Foster noted that the residential spaces would be at the west end of the garage and the church spaces at the east end, so only the church spaces would be inconvenienced by the day care center queue. Mr. Foster does not expect the day care center queue to extend back far enough to block the turn off from the entrance into the residential parking. He assumes that parents of very young children will park in church parking spaces and bring their children in, despite the fact that they may not have room to back out of a parking space until the queue has dissipated. *See id.* at 174, 181. Mr. Foster estimated that the peak period with cars stacked up in line for the day care center would be 15 to 20 minutes long in the morning and 15 to 25 minutes in the afternoon. *See id.* at 184-85. He suggested that people who come to the church regularly will learn not to arrive or leave during those periods.

Mr. Foster noted that there is room for about 12 cars to stack up waiting for drop-off/pick-up before spilling out into the Old Georgetown Road driveway, and eight or nine before the residential parking would be blocked. *See id.* at 194. He considers that to be more than twice the space necessary, based on a rule of thumb that calls for enough space to stack five cars for a day care center. *See id.* at 173-75. Mr. Foster suggested that the 62 church spaces represent almost twice the number of parking

spaces required by the Zoning Ordinance for the day care center, so half of those spaces should be considered available for church or community center users.

Mr. Foster acknowledged that the 62 spaces proposed for the church are essentially the same number of spaces the church has now. He indicated that based on information from the church, the existing parking spaces are not frequently full, and if more parking were necessary, there are public parking garages nearby. He noted that community center activities and church activities can be designed not to conflict, and that most of those activities would not have the peak attendance of Sunday services that is the basis for the code requirement for church parking, which would be satisfied under this plan.

Under questioning from a community member Mr. Foster stated that the basketball court is planned with a seating area where chairs could be set up for 150 to 200 spectators. *See id.* at 195. In response to a question about whether townhouses had been considered for the site, instead of multi-family housing, Mr. Foster testified that replacing the existing parking spaces required an underground garage, and townhouses typically do not have public or non-residential parking underneath, so it was not a practical model to consider. *See id.* at 197. He estimated that the total building square footage under the plan would allocate about 14,000 square feet to the church, the community center and the breezeway, and about 22,000 square feet to the residential.

On re-direct, Mr. Foster gave his interpretation of the reference on page 12 of the Staff Report to measuring the 60-foot setback area from the Old Georgetown Road right-of-way. *See id.* at 208-209. He stated that based on the words and discussions with Staff, he believes that right-of-way meant the edge of the road. He recalls discussions about the road width not changing, and the fact that the tall office building across Glenbrook Road from the site is set back 14 feet from the face of curb. *See id.* at 210. Mr. Foster does not consider it inconsistent or unusual to use the term “right-of-way” when you mean “face of curb.” *See id.* at 211-212.

When asked whether he felt that the tall building across Glenbrook is something he needed to integrate into his design, or something to ignore and design around, Mr. Foster stated that the architecture of that building is not to his taste, but it is part of the urban context, and some buildings are better than others. *See id.* at 222.

On further re-direct, Mr. Foster testified that if the community center building were pulled back on the site to comply with the Sector Plan's 50-foot height limit within 60 feet of the road, there would be a negative effect on the aesthetics of the building. *See id.* at 215-217. He stated that the bay window would "share some of the vertical rhythm going in and out" and pulling the building back would "lose this presence in the foreground" that is designed to provide proportionally similar basis for the three buildings. *Id.* at 216.

Mr. Foster clarified that Applicants do not intend for pedestrians to walk through the lobby of the new residential building to get from Rugby Avenue to Old Georgetown Road, but it would be possible for them to walk along the driveway at the west edge of the site. *See id.* at 220. There would not be a marked pedestrian path, but Mr. Foster expects the traffic count on that driveway to be low. *See id.* He considers this an improvement over the current situation, where pedestrians cross through the parking lot and by dumpsters.

4. Kenneth Dye, property line surveyor. Tr. June 6 at 12–54.

Mr. Dye, a licensed property line surveyor for 18 years, was designated an expert in property line surveying. He is personally familiar with the property in question and prepared the Identification Plat, Exhibit 8. Mr. Dye stated that the Identification Plat was based on an ALTA survey, which presents a boundary of the subject property based on land records, sending field crews out to locate all property corners and locate all buildings on site and then making a determination of where the property is actually situated. *See* Tr. June 6, 2008 at 16-17.

When there are discrepancies regarding property lines, a hierarchy of criteria is used to best determine the property line. First, physical monumentation is used to clarify discrepancies. This is the use of physical and artificial monuments. Then bearings, angles, distance, and area are used to best ascertain the correct property lines. Mr. Dye states that this is the industry standard. *Id.* at 19-20. Only evidence in accordance with the hierarchy that determines property lines is shown in the ALTA survey.

Mr. Dye's lot line calculations which relate to the accuracy of the Applicant's gross tract area calculation were compared to area tabulations, SDAT (tax assessor) key areas and deed records. The first comparison was made along the line between the subject property and the rescue squad property, which was highlighted as yellow on an Annotated ALTA survey, Exhibit 304. *Id.* at 21-22. The SDAT is based on the record plat or deed when recorded. However, Mr. Dye found an overlap of meets and bounds from the rescue squad property onto the subject property, on parcels 8 and 9. *Id.* at 22-23. He determined the correct property line by comparing what was currently marked as an angle point, which showed a corner that appeared as an original corner on the original plat. *Id.* at 23-24. Therefore, Mr. Dye opined that he was very comfortable with the property line that he had marked on his ALTA survey and identification plat.

The next issue was the two foot reservation shown on parcels 7 and 8, on the original plat. This two foot reservation appears to be a spite strip, which the church obtained by deed. The longest line on the property is 150 feet, but the deed states 248 feet. *Id.* at 25-26. Mr. Dye identified on his annotated ALTA survey where he believes the true property line is. *Id.* at 24.

The green highlighted area of the Annotated ALTA survey showed the largest discrepancy, on parcels 5 and 6 which were the subject of a taking in July of 1938 for Old Georgetown Road, a state highway. *Id.* at 27. These takings were never deducted from the original deed or plat, nor reported in an instrument. *Id.* at 27. Mr. Dye went to the best evidence available to him, which was the 1959 or 1968 highway field notes, and placed the right of way as best he could. *Id.* at 28. Using the field notes

he did an actual on-site survey and identified a prescriptive easement on parcel 6, explaining that the State Highway Administration takes the position that it owns land customarily used for a public road by prescriptive easement, and only has to pay for land it needs beyond that. *Id.* at 29. Mr. Dye opined that the property line on his ALTA survey and Identification Plat is correct. *Id.* at 29.

Mr. Dye continued with an overview of each plat and how he calculated the correct property line or square footage.

Upon cross-examination regarding the setback measurement from the face of the church to Old Georgetown Road, Mr. Dye stated that the 36.7 feet from the base of the church is to the property line, not the street. *Id.* at 35. Mr. Dye then acknowledged that measurement of the setback is usually done from the right-of-way to the house or building, unless otherwise directed. *Id.* at 37. The setback from the church to Glenbrook is 29.8 feet. Mr. Dye acknowledges that the property line and the right-of-way line are the same on the subject property. *Id.* at 38

Mr. Dye testified regarding the differences between the SDAT numbers and his on Parcels 5 and 6, which have to do with takings v. prescriptive easements. He acknowledged that approximately 7,750 square feet on parcels 5 and 6 were used for the road, but not formally taken by the SHA and opined that the Applicants were correct in excluding this square footage from the gross tract area. *Id.* at 49-50

5. Susan Kirk, Executive Director, Bethesda Cares. Tr. June 6 at 129–139.

Ms. Kirk has been the Executive Director of Bethesda Cares, a community outreach program for the homeless, for the past 12 years.

Bethesda Cares strongly supports the re-zoning application for the subject property, based on a strong association between the church and social service organization sharing space and providing services together to the community. *Id.* at 132. The services provided include: an eviction assistance program, helping the homeless regain stability. They have over 6,000 walk-in visits per year. Last year they helped 600 families stay in their homes, plus helping people find jobs and providing

psychiatry services and a social worker to assist as needed. Lunch is served Monday – Friday from the 16th through the 31st of every month at the subject site, and the volunteers number about 450, with many coming from the church. They help serve lunch, make pies, and put together stuffed backpacks at Thanksgiving and street survival kits. *Id.* at 130-132.

Bethesda Cares would lose their lunch site for three years during construction of the proposed development, but they support the chance to build something long term, as a place where “community can happen.” *Id.* at 133. Ms. Kirk states with the proposed rezoning and developments, Bethesda Cares would be able to provide more day care, elder care and mental health care, and assist families in accessing the MPDU’s that will be built on the property. She adds that Bethesda Cares will then be able to have a greater impact upon the surrounding community. *Id.* at 133-134.

Under cross examination, Ms. Kirk specified that self-help services and office space would be expanded, including possibly having an office for their psychiatrist. Bethesda Cares has been limited in the services they provide because of the lack of space. *Id.* at 135. Ms. Kirk states that the current facilities at the church are deteriorating, the kitchen is very small and there is a lack of security. With the new facility, the church and Bethesda Cares will be able to provide more lunches during the week, have newer and more office space, and be able to provide services to the community at a much higher level. *Id.* at 136-137. Ms. Kirk was very clear that the church has brought all the players to the table, meaning the nursery school, day care center, fellowship house and Bethesda Cares, so that they could brain storm on what facilities they would all like to see. This is how they came up with the gymnasium and the intent behind the gym was to make it a community center. Without the gym, she states, the intent would be severely impacted. *Id.* at 137-138. Ms. Kirk hopes that her homeless clients will be able to use the gym, but those details have not been determined.

6. Rebecca Wagner, Executive Director, Interfaith Works. Tr. June 6 at 139–151.

Ms. Wagner has been the Executive Director of Interfaith Works for the past 8 years, and a volunteer for 36 years. Interfaith Works is a coalition of 140 congregations working together to meet the needs of the poor by providing emergency shelter, day programs for homeless adults, homes for disabled adults, and other assistance. Ms. Wagner described the church on the subject site as a hub for the low income population in the Bethesda area, and part of a complex network of service organizations. See Tr. June 6, 2008 at 141-142

Ms. Wagner believes that Interfaith Works is part of a web of services that are provided throughout the County. When she heard of the possible re-zoning and the expansion of the Christ Lutheran property, she was hopeful that this would strengthen the neighborhood, and create a multi-generational complex. *Id.* at 143. She strongly supports the present re-zoning application. *Id.* at 144.

Ms. Wagner explained that if the re-zoning were approved, and the plans implemented, she would have a place to hold community meetings in Bethesda. *Id.* at 144. In addition, the expansion would create a whole community out of a diverse neighborhood, including day care, senior care, serving the homeless, etc. *ID.* at 145.

One thing that Ms. Wagner cites as being crucial is that in re-zoning and then expanding the subject property, it will strengthen the community, and allow for meeting current and future needs. She says that right now, they have to turn people away. Ms. Wagner acknowledges that Christ Lutheran is reaching their limit in terms of functionality and that expansion would allow for continued growth. *Id.* at 146.

Under cross examination, Ms. Wagner states that from what she knows of the neighborhood, everyone in the community would benefit from the services that would be provided by Christ Lutheran. *Id.* at 148. She opines that something as simple as a firefighter or nurse who may qualify for one of the MPDU's and be able to live in the community, close to work, instead of driving from Frederick or Damascus is pretty powerful benefit. Also, surrounding neighbors being able to utilize the day care, or

after school care programs, instead of children going home to empty houses. Or the expanded services to assist those in need. *Id.* at 148-149. Ms. Wagner further opines that the gymnasium is a key component for after school activities that can combine homework areas and physical activity for the children. Without certain parts of a community center, she opines, some people from the community won't feel invited. *Id.* at 150.

Upon further cross examination, Ms. Wagner stated that she is not aware whether neighborhood teenagers will be part of the mix of after school activities, nor how many firefighters would or would not move back into the county, given affordable housing options. *Id.* at 151.

7. Deborah Miness, Executive Director, Washington Smart Growth Alliance. Tr. June 6 at 152-163.

Ms. Miness is the Executive Director of the Washington Smart Growth Alliance (WSGA). The WSGA is a regional non-profit that includes business, environmental and civic organizations. Its mission is to research, identify and encourage land use and transportation practices that protect environmental assets and enhance the quality of life. *Id.* at 153.

In January of 2008, the WSGA jury recognized the subject property as a smart growth project. This is based on location, transportation access, density, design, diversity of use, affordable housing, community assets and participation. *Id.* at 153. The jury found that the project would benefit the community by allowing the church to continue providing services at its current location, reducing development pressure in outlying areas, and providing pedestrian friendly streetscape, a new community building with meeting room space, classrooms, a gymnasium, day care and theater space, and housing located close to public transportation. This, Ms. Miness stated, will reduce dependency on automobiles and contribute to the balance of jobs to housing. *Id.* at 154.

Ms. Miness noted that the environmental planning of this project, including storm waster management, green building design and incorporating neighborhood input into the design, are additional benefits. *Id.* at 154-155.

Ms. Miness explained that proposals are usually submitted to the jury usually by the developer, who pays a \$1,500 fee, and are reviewed on a quarterly basis. *Id.* at 157. If the project meets the criteria then the project will get a WSGA jury recognition, unrelated to whether any other projects are so recognized. The project is evaluated only on what is submitted, without any input from the neighborhood. *Id.* at 157, 161-162.

The subject property would provide for increased, diverse use of the property, including housing, which would allow for a higher density and since it is close to public transportation and many other businesses, allow for the reduction of vehicle use. This would mean a potential reduction in urban sprawl. However, this does not mean that if there are residential units built on the property, that urban sprawl would not continue to happen. Ms. Miness acknowledges this, but reiterates that the WSGA promotes smart growth on the basis that more intense growth in urban areas will reduce the demand for growth in other areas. Ms. Miness opines that this project would benefit the entire community. *Id.* at 158.

8. Clark Wagner, Bozutto Homes, Inc. Tr. June 24 at 28-45.

Mr. Wagner is Vice President and Director of Development for Bozutto Homes, Inc. He is the project developer for the subject property, handling land acquisition, assembling a design team, pursuing entitlements, obtaining financing and developing the construction documents. He is intimately familiar with the subject property and application for re-zoning. *See* Tr. June 24 at 29, 31.

Bozutto Homes was selected by the church to develop the condominium portion of the subject property project. Bozutto Homes then formed BA Old Georgetown Road LLC (BAOG), entering into a joint venture agreement with the church in order to eventually purchase a condominium parcel from the

church, then develop and build the condominiums once the project was cleared to move forward. *Id.* at 29-31. Bozutto Homes/BAOG will also be the general contractor for the church portion of the development, if it goes forward.

Mr. Wagner testified that Bozutto submitted an application to the Smart Growth Alliance. He explained that the Smart Growth Alliance recognition is a very lengthy complex process. *Id.* at 31. Mr. Wagner emphasized that there are many applications but few recognized as a Smart Growth project. Therefore they were very happy to have the subject property recognized as a Smart Growth project. *Id.* at 32.

Once the project receives final approval, the 107 condominiums, underground parking, church renovations and community building will take approximately 24 months to complete. Mr. Wagner specified that they would start with some building demolition and utility installation, then move to building the parking garage, followed by building the condominiums and church renovations. *Id.* at 32-33. He explained that he had not personally been involved with neighborhood meetings regarding the project, but a Bozutto representative had been at every neighborhood meeting. *Id.* at 33-34.

Once the project is complete, BAOG and the church plan to enter into an agreement that would allow for a shared use agreement of the entire property to allow condominium owners to use some of the church facilities and vice versa. They also plan an agreement regarding maintenance and quasi-public areas, reciprocal easements, open space and the use of the garage. However the specific details regarding cost sharing and actual use have not been worked out. *Id.* at 34-35. Mr. Wagner did expand on the issue of parking for the condominiums, stating that the plans show about 40 spaces above the County requirement, more than what would be needed by residents, so some could be visitor spaces. *Id.* at 35-36. On cross examination, Mr. Wagner repeated that the details of a shared use agreement had not been worked out. He acknowledged that the facility use would most likely be event related and that

there may be some free sharing of space, but there would not be an open, 24-hour-a-day arrangement for residents to go play basketball, or church goers to use the condominium pool. *Id.* at 39-40.

Mr. Wagner acknowledged that he was aware of the obligations of the re-zoning classification and binding elements for PD-44 zones. He also acknowledged that Bozutto and BAOG intended, as co-Applicants, to operate in accordance with the statements and plans submitted with the application for re-zoning. *Id.* at 35.

On further cross examination, Mr. Wagner explained the demolition phase would likely last no more than 30 days. *Id.* at 36. He stated that all the parking would be underground, below the first level of the church sanctuary, so there would be digging on the east side of the church sanctuary. *Id.* at 37-38. Steel pilings would be driven into the ground as part of a bracing system, called sheeting and shoring, to support the church building during garage construction. *Id.* at 38-39.

Mr. Wagner states that the relationship between Bozutto and the church, regarding the construction of the community building, is that of contractor and owner. The church would pay Bozutto as contractor to build a building. *Id.* at 41-42. He noted that the relationship is different regarding the condominiums because the church will be selling BAOG the land. The church will get a newly renovated church and community/education building along with parking, day care site, etc., while Bozutto and BAOG will purchase land from the church and build the condominiums. *Id.* at 42-43.

9. Marvin T. Tollefson, Pastor, Christ Evangelical Lutheran Church. Tr. June 24 at 46-102.

Reverend Tollefson has been a clergyman for 38 years, the last 25 years as Pastor of Applicant Christ Evangelical Lutheran Church. The Pastor is responsible for weekly worship and preaching, pastoral care of parishioners and administrative oversight of the church. *See* Tr. June 24 at 47-48.

In 2000, the church began to look at the services it provided to the community and its fiscal ability to provide those services. The church was being asked to provide more and different services,

because the community had itself grown and changed. The church commissioned a study of the buildings on site and determined that their age and construction would limit the ability to provide new and expanded services, especially for youth and younger children. *Id.* at 48. Three options were discussed after the study: move, renovate, or rebuild, to meet the needs of the church and the community. The church congregation chose the third option, issued an RFP, and selected Bozutto Homes, Inc. as its development partner. The church entered into an agreement with Bozutto's BA Old Georgetown Road, LLC (BAOG) and proceeded with the application process for re-zoning. *Id.* at 49-50. Rev. Tollefson explained that the church plans to sell part of its land to Bozzuto, then pay Bozzuto to build the new community center.

Rev. Tollefson is personally familiar with the re-zoning application, along with the plans and reports submitted with its application. He described goals to preserve and renovate the sanctuary and build a new, four-story family life center to house various ministries, including child care, non-profit functions, and a recreational center with a gymnasium. The plans also include an eight-story condominium building with 107 units including MPDUs. Parking is to be moved underground, additional green space will be created and buildings will be LEED certified. Rev. Tollefson expanded the plan's vision, stating that the church is in an advantageous location, accessible by car, bus, metro or walking. The church wanted to take advantage of that accessibility and to provide more space for a spiritual community and enriching people's lives through caring relationships and meeting basic needs. *Id.* at 51-52.

Rev. Tollefson stated that with the new community center, current programs could be expanded and new services provided, such as increasing the availability of family counseling, doubling the size of the child day care facility and adding after-school care. *Id.* at 53. The new gymnasium would provide a place for youth to come play basketball or work out, since there is no public gymnasium in this part of Bethesda, and would also provide an exercise location for seniors, and a place for all kinds of family

activities. *Id.* at 53-54. Rev. Tollefson stated this would be a community-based recreational center, open to all, with minimal fees. *Id.* at 54. The overall vision is a multi-level community building that on the ground level would have day care, the gym serving for early morning workouts for local professionals, day use by seniors, after-school activities for youth, and junior varsity or county basketball league games in the evenings. *Id.* at 93-94.

Rev. Tollefson acknowledged a lack of details for use agreements anticipated between the church and the condominium owners association. He suggested the agreements would include the shared costs of maintenance of the grounds and other common areas, as well as agreements to share facilities like the gym and pool, so as to be hospitable and inviting. *Id.* at 55-56.

Beginning in 2005, the church has engaged local home owner associations, community leaders, and individual neighbors to review plans for the proposed renovation and expansion. *Id.* at 57. Rev. Tollefson presented a Community Meetings List (CML) to document these meetings and additional conversations with individuals regarding the proposed expansion. *Id.* at 58. Rev. Tollefson confirmed that because of these conversations and meetings, the church has directed the architect to make several modifications to the original plan, especially changes along Rugby and Glenbrook for neighbors. *Id.* at 59.

Rev. Tollefson stated that the child development program will have a capacity of 125, and the target range is from infant to four years old, open to church and community members. He noted that there would be additional State licensing for this program and the after school program would include five to eleven year olds. *Id.* at 82.

Rev. Tollefson was not sure of the number of basketball courts within three blocks of the church. He stated that the gymnasium at the church will have a regulation junior varsity basketball court and additional side rooms with workout equipment. *Id.* at 84. All these facilities will be open to the public for use and rental, as the church and its buildings currently are. *Id.* at 84-85.

Rev. Tollefson acknowledged that he is fully aware of the obligations of the Applicants and requirements of the proposed PD-44 reclassification. As representative of the church, he is ready to operate and abide by all requirements and binding elements of the application. Further, he emphasized the enthusiasm with which the church has embraced the project. *Id.* at 62-64.

Under cross-examination, Rev. Tollefson stated that when the RFP was issued, the overall intent was to find a developer who was flexible and could help make the services the church wanted to bring to the community viable. *Id.* at 64. The church's motivation was always to better serve the community. *Id.* at 65. During the community meetings there were concerns regarding the `condominium, however, Rev. Tollefson reiterated that the need-based assessment drove the project and that is how they came up with the plan. *Id.* at 65-66.

Rev. Tollefson acknowledged the steeple will be blocked from view to the houses right behind the church but noted that the steeple has a great deal of visibility from a number of angles. *Id.* at 69. He conceded that the number of parishioners has decreased in the last 15 years, however, many still attend who live within walking distance, and about 60% reside within a 2-3 mile radius. He stated the church primarily serves the Bethesda-Chevy Chase area, which is about a 4-5 mile radius. *Id.* at 70-72.

Rev. Tollefson reiterated the three options the church had when considering the future of the property, noting that renovating would cost almost half as much as rebuilding and they would get more by rebuilding. *Id.* at 73-74.

In later testimony, Rev. Tollefson stated that the church is first limited by funding and secondly by mission. To meet the mission/goals, the church looked at what was wanted or needed in the community, then considered how they would pay for it. *Id.* at 100. Partnering with Bozutto was only a part of being able to pay for the rebuilding. *Id.* at 101.

Rev. Tollefson stated that homes on Rugby and Glenbrook owned by the church are used for various ministries. One currently houses a family that lost their home in hurricane Katrina. *Id.* at 75-

76. He explained that while the church will lose that house for emergency help if the proposed redevelopment goes forward, they will gain space to work with Lutheran Immigration and Refugee Services, who will work out of offices on the second floor non-profit space, which will be better able to relocate immigrants, refugees and homeless people in the surrounding area. This would be an expansion of services for the church. *Id.* at 76.

Rev. Tollefson acknowledges that there have been discussions with Bozutto regarding the parking structure. *Id.* at 77-79. He noted that there are currently 62 parking spaces, and an additional 70 adjacent at the rescue squad if need be, with an additional 700 + spaces at a public parking facility 500 yards away. *Id.* at 79-81. He stated that the church has agreements with other non-profits that regulate the timing and use of space at the church for different activities and for people who come to utilize services. This would continue with the new building. *Id.* at 99. Rev. Tollefson states that a fair number of people come from the surrounding neighborhoods and walk to the church and its functions. *Id.* at 98.

In response to a question from a community member, Rev. Tollefson stated that removing all the trees on site concerns him, but he thinks it would be balanced by increased green space and redeveloping the front of the church with new trees, creating a more beautiful environment. *See id.* at 91-92.

10. Michael Lenhart, transportation planner. Tr. June 24 at 108-192.

Mr. Lenhart was designated an expert in traffic engineering and transportation planning. He is personally familiar with the property in question, the surrounding area and the application, and prepared the analysis of transportation issues for the project. *See* Tr. June 24, 2008 at 108-111.

Mr. Lenhart explained the changes in LATR and the new Policy Area Mobility Review (PAMR) standards, which will apply to this project if it proceeds to subdivision. He then described the traffic study he prepared in this case, as discussed in Part III.F.

Mr. Lenhart noted that the subject property is just outside the Bethesda CBD, but is within the Bethesda Transportation Management District. The goal of the district is to reduce vehicle trips by 30% or so within the designated area. *See Id.* at 120; Tr. Sept. 9 at 14-15. If the proposed project goes forward, it will be required, as a Planning Board condition, to participate in the transportation district and in programs to increase the use of transit and reduce personal vehicle use. *Id.* at 121-122.

Mr. Lenhart stated that at subdivision, PAMR would require a mitigation of 30% of the trips to the subject property. Through participation in the Bethesda Transportation Management District and steps such as providing a set of bike lockers along the frontage of Old Georgetown Road, as shown on the Development Plan. Mr. Lenhart stated that the Applicants would have no difficulty satisfying LATR and PAMR. *See* Tr. June 24 at 127.

Mr. Lenhart acknowledged community concerns regarding traffic on Rugby Avenue and Glenbrook Road. He noted that Old Georgetown Road would be the primary access point for residents and day care, and Glenbrook for the church and community center. Mr. Lenhart opined that there should not be any restrictions into or out of the subject property on Glenbrook Road for building residents. Mr. Lenhart acknowledged testimony from the architect that traffic through the garage would be one-way during peak day care center drop-off and pick-up hours. Mr. Lenhart does not consider that necessary, although it could be done. *Id.* at 134.

Mr. Lenhart acknowledged that there is no one specific formula for determining how much traffic will go a certain way, however, he does contend that the overall travel patterns are dictated in the LATR guidelines, which is a well established formula at MNCPPC. *Id.* at 134. Mr. Lenhart does not agree with the assessment that the proposed project would lead to an increased use of Glenbrook Road as a cut through. He pointed out his analysis, which shows that during peak hours, traffic volumes on Glenbrook are very light. He noted that the intersection of Rugby and Glenbrook operates at a CLV of 165, and the allowable threshold is 1,800. *Id.* at 135. Mr. Lenhart points out that Norfolk is identified

as a main street in the Woodmont Master Plan and Glenbrook Road is located at the very end of it, thus feeding into it, so some traffic should be expected. *Id.* at 136.

Mr. Lenhart observed that Auburn Avenue at Old Georgetown has a traffic signal, so coming from Rugby, it is much easier to get onto Old Georgetown at Auburn. Glenbrook has turn restrictions, which make for a more difficult drive and reduce its traffic counts. That incentive would continue with this project in place. Existing volumes suggest that Glenbrook is not a significant cut-through.

Mr. Lenhart addressed parking, as outlined in Part III.F.

Mr. Lenhart opined that from a traffic point of view, the proposed rezoning would be in harmony with the general character of the surrounding neighborhood, would not have any detrimental impact on the use and enjoyment of surrounding properties, and would not have an adverse effect on health and safety, including vehicular or pedestrian safety. *See id.* at 156.

Under cross-examination about the article on day care center parking that he used, Mr. Lenhart acknowledged that of the 29 day care centers cited in the article, only two were as large as the day care center proposed for this site, and none had structured parking, or were located in a mixed-use building. *See id.* at 158-59. Mr. Lenhart is not aware of any child day care centers located in a mixed use facility with underground parking shared with a residential building as well as other community-oriented uses, but he is aware of many projects with shared parking resources, and he considers this no different.

Mr. Brown asked Mr. Lenhart to compare traffic levels on Glenbrook Road and the next street going towards the CBD, Auburn Avenue. Mr. Lenhart calculated traffic going both directions on Glenbrook at 170 trips during the morning peak hour and 159 during the evening peak hour. *See id.* at 168. At Auburn, he calculated 239 total morning peak hour trips and 430 in the evening. *See id.* Mr. Lenhart agreed that the numbers are not very far apart for the two intersections. He stated that his is because they both experience the same through traffic on Old Georgetown Road.

Mr. Lenhart acknowledged that some residents can be expected to turn left from Old Georgetown Road in to the subject site if the development goes forward, and that turning left at that location would be more difficult than turning right. *See id.* at 170-71. He noted, however, that there is a left-turn lane for cars to sit in waiting for a break in the traffic. He estimated that the proposed development would cause peak hour left turns into the site from Old Georgetown Road to increase by two in the morning and five in the evening. *See id.* at 171.

Mr. Lenhart expects the Old Georgetown Road driveway to have full movements, if the development goes forward, although he acknowledged that the State Highway Administration may choose to restrict left turns leaving the site. If that were the case, he suggested that drivers could exit the site onto Glenbrook and proceed to Auburn, where they can make a left turn at the traffic light. (At the time of this testimony, the Development Plan did not provide for access in and out of the site via Rugby Avenue, except for deliveries.) He stated that this would be a minimal amount of traffic and would have no effect on his conclusions. *See id.* at 174. Due to the low volume of trips he expects, he thinks it would not be a problem for residents to drive past the day care center queue to exit onto Glenbrook Road. Moreover, Mr. Lenhart opined that the site access point would not need a left-turn restriction at Old Georgetown Road because the volumes are much lower than at Glenbrook Road. He expects the gaps created by nearby traffic signals to be adequate for the small number of vehicles involved. *See id.* at 189.

Mr. Lenhart testified again under cross-examination at the last hearing date. He stated that his firm did not conduct a traffic signal warrant study or similar study related to the intersection of Glenbrook Road and Old Georgetown Road, because there are left turn restrictions during the peak hour. Similarly, they did not do a queuing analysis for the intersection of Old Georgetown Road and Battery Lane.

In response to questions from the Hearing Examiner, Mr. Lenhart described the basis for the trip generation rates used in his study. He stated that the traffic components they looked at were basically the day care center and the residential, because the church has the ability to schedule most activities in the church and community center to have minimal traffic impact during the peak traffic hours. *See* Tr. Sept. 9 at 7-8.

The Hearing Examiner asked Mr. Lenhart to address pedestrian safety and vehicular access concerns raised in a letter from community member Steven Teitelbaum. *See* Tr. Sept. 9 at 18-19, citing Ex. 300. He explained that there is no crosswalk across Old Georgetown Road and Glenbrook Road because it is not a signalized intersection – typically they do not put crosswalks on a major road if there is no traffic light, because they want people to walk to the nearest signalized intersection. In this case, there are traffic signals one block north of Glenbrook, at Battery Lane, and one block south at Auburn. Similarly, Mr. Lenhart stated, there are no crosswalks at the intersection of Rugby Avenue and Norfolk Avenue because it is not signalized. In Mr. Lenhart's view, crosswalks would not be a bad idea at that intersection, although he does not consider their absence to be a cause for concern, since there are sidewalks on both sides of the road and very good pedestrian connectivity. *See id.* at 22-23. He stated that the proposed project would have little impact on that intersection – the larger factor would be the nearby park.

Mr. Lenhart was adamant that his traffic study did not depend on additional dedications that were listed on a memorandum from Transportation Planning Staff at MNCPPC and then crossed out. He stated that the additional right-of-way at issue would have no effect on traffic conditions, because Old Georgetown Road could not be widened with all the development on it, and Glenbrook already has a peak hour left turn restriction, reducing possible movements during the most congested time to straight and right, so is no need for an additional lane. *See id.* at 24-25. Even if Glenbrook were widened to create an additional lane, Mr. Lenhart opined that left turns would still be prohibited during

the peak hours to encourage drivers to use the nearby signalized intersections. Mr. Lenhart disagreed with the notion that the Glenbrook/Old Georgetown Road intersection should be signalized. He contended that there are other nearby intersections with signals, and the State and County have put a left-turn restriction in place at Glenbrook to prevent it from becoming a main route to Old Georgetown.

On re-direct, Mr. Lenhart noted that Transportation Planning Staff agreed with a parking study that Mr. Lenhart did during the course of the hearing process. *See id.* at 31. He defended an article that he had relied on in that study, calling it inconsequential that only two of the day care sites referenced in the article had more students than proposed at the subject site. Mr. Lenhart considered the article well-founded because the authors used standard practice, collecting data from day care centers with varying numbers of students from 17 to 144, to get a good cross-section. He also noted that the 125 students anticipated for the proposed project falls within the range of centers studied. Mr. Lenhart drew the same conclusion with regard to the number of staff at day care centers cited in the study, noting the number proposed at the subject site is within the range of the study data. Mr. Lenhart also considered it immaterial that none of the sites in the article had structured parking or mixed use parking, as proposed in this case. “Parking is parking,” he insisted. *See Tr. Sept. 9 at 33.* He explained that a study of day care center parking needs would have to focus on stand-alone day care centers to be able to isolate the parking needs for that use. That would be more difficult to do at a mixed use site. Mr. Lenhart acknowledged in later testimony that in general, having more data points allows a study to accurately fit the data to a curve. *See Tr. Sept. 9 at 39.* However, he considers the 29 samples used in the article to be sufficient, particularly considering that the result matched his field results at this site. *See id.* at 40.

Mr. Lenhart noted that when his firm surveyed the existing parking lot at the church, they found that the parked vehicles associated with the child day care drop-off and pick-up matched almost exactly the trip generation rates published by the ITE for a day care center of the same size. *See id.* at 34.

Finally, Mr. Lenhart described the evolution of the Rugby Avenue access to the site. *See id.* at 36-37. The original proposal included a driveway from the end of Rugby that went around the north corner of the building and out to Old Georgetown Road. Later, connection around the corner of the building was changed to grass-crete pavers. On the final plan, the connection between Rugby and Old Georgetown has been reestablished, with an intention to install an electronic gate to limit its use to building residents. This would prevent cut-through commuter traffic, a concern that had been voiced at an earlier stage in the hearing process. Mr. Lenhart noted that emergency vehicles can either have access to a key or, if necessary, drive through the gate. He noted that his traffic study was based on the original Development Plan, which included site access from Rugby Avenue. Thus, the numbers used in his study would not change.

B. Pre-Remand Opposition

1. Geoffrey Uyehara, architect. Tr. Sept. 9 at 52 – 66.

Mr. Uyehara was designated an expert in architecture, although he is not a registered architect. Mr. Uyehara has a masters degree in architecture, and has designed buildings for approximately 20 years. He has made models before, although he is not a professional model-maker.

Mr. Uyehara created the model of the subject property based on the plans of project provided by the Applicants, then scanned into the computer and scaled down. Pieces are produced, similar to a puzzle, which are cut and put together. If the pieces do not match up, then the scale is wrong, however, in this model, everything fit together pretty well. *See* Tr. Sept 9. 54-55, 59.

Mr. Uyehara also did models of the surrounding homes based on photographs and measurements that he took. *Id.* at 55. He opined that his model of the subject property and surrounding houses are reasonably to scale. The model of the proposed residential building doesn't have things like windows because they were not on the plans provided to him. *See Id* at 57. Mr. Uyehara also took the photographs of the model that were submitted at the hearing.

Mr. Uyehara only made what he was contracted to make, and that did not include the tall office building right across Glenbrook from the subject property. It did include the houses along Old Georgetown Road, which he agreed are farther from the site than the tall office building. *Id.* at 60-61.

2. Ralph Schofer, Transportation Engineer. Tr. Sept. 9, 2008 at 67-110.

Mr. Schofer was designated an expert witness in traffic engineering and pedestrian safety. *See* Tr. Sept. 9 at 72.

Mr. Schofer opined that the gated entry off Rugby Avenue would bring additional traffic to Rugby. He acknowledged that it would not be a lot of traffic, but stated that it would be significant because there is very little traffic there today. *See id.* at 73, 76. Mr. Schofer stated that Rugby Avenue will have the grand entrance to the residential building, and that is where taxi drivers and small delivery trucks will go. He noted that pedestrians walking past the gate would not be separated from vehicular traffic, creating a safety issue. Further, the additional access would put more traffic up by a highway intersection on Old Georgetown Road that is unsignalized, with pedestrian traffic. *See id.* at 73.

Mr. Schofer noted that the adjacent rescue squad has a driveway entrance off of Old Georgetown Road that crosses over the entrance proposed for the subject site, which currently exists, but would be expanded and used more extensively with the proposed development. He considers it a safety risk to vehicles and pedestrians to have two driveway entrances converging on Old Georgetown Road at the same location. *See id.* at 75-76. He noted that the current site driveway at that location carries one-way traffic, so changing it to two-way traffic would increase the hazard.

Mr. Schofer is concerned that the Glenbrook Road access point would raised safety issues because trash trucks, furniture delivery trucks and other large vehicles will be unable to turn around inside the garage, so they will have to turn around on Glenbrook Road – a narrow street – and back into the underground garage. He considers this hazardous for pedestrians and other motorists trying to use the Glenbrook Road access to the garage. *See id.* at 77-78. He also believes the garage access from

Glenbrook has the potential for many conflicts among the various motorists coming to the child day care center, church activities such as weddings and funerals, community center activities, trash pick-up, an moving trucks. *See id.* at 79. He argued that the potential for conflicts is particularly acute because the site would be managed by two different entities, Bozzuto and the church, leading to potential coordination problems. *See id.* at 102.

Mr. Schofer's chief concern about the garage is the child day care center, which he believes, based on the name he saw on a sign on the site, will operate like a nursery school, with a set starting time, rather than a day care center, where children arrive and leave at varying times. Mr. Schofer argued that more parking is needed for a nursery school because all the parents arrive within a brief period of time. He contended that dropping off or picking up a pre-schooler takes some time, so the turnover in the parking spaces would not be as quick as the Applicant's experts assumed. *See id.* at 80-82.

Mr. Schofer contested the validity of the two articles cited by Mr. Lenhart, noting that the one on queuing was based on a single study at a single site, and the one addressing parking was based on 29 sites, only two of which were as large as the day care center proposed in this case. He considered the articles inadequate, moreover, because they contained no statistical tests of the data, which he considers common in traffic engineering magazines.

Mr. Schofer believes that the queuing space within the proposed garage is inadequate, in large part because he believes that parents will not want to wait in a line to pick up or drop off a child, but will park and walk in to the day care center. This conclusion appears to be based in part on Mr. Schofer's personal experience as a grandparent. He maintained that drivers will need more space to line up because they will be waiting for parking spaces, not for a drop-off/pick-up point. *See id.* at 84-85.

Mr. Schofer stated that if the residential building were the only use proposed, the first change he would make would be to separate the loading dock and trash area from the garage access and egress, because they don't fit together, and they have different functions at different times. *See id.* at 86. Looking at apartment buildings in the area in the weeks leading to the hearing, Mr. Schofer did not find any that had a loading dock commingled with parking. Here, the Applicants proposed to commingle multiple streams of traffic with the loading dock and trash area.

Mr. Schofer argued that the courtyard/playground serving the day care center should have two egress points, not just the one to the garage. *See id.* at 90. He was perhaps unaware that the playground would also have access into the community building, and thence to the outside. Mr. Schofer is also concerned about exhaust fumes collecting in the playground, which would be closed in on three and a half sides.

Mr. Schofer opined that the Sector Plan recommendation for a 50-foot building height limit in the first 60 feet from Old Georgetown Road should certainly be interpreted to measure the 60-foot area from the road right-of-way. *See id.* at 91-92. He explained that the right-of-way line is physically established and can be reproduced, and a surveyor can mark it. Mr. Schofer consider a curb line a very indefinite surface, because it is based on the design of the curb, which can take many shapes and is ill-defined. *See id.* at 92. In 40 years as an engineer reviewing engineering drawings, Mr. Schofer stated that he has never seen dimensions measured from the face of curb rather than the road right-of-way, which delineates the separation between private and public property. The curb face can change, he noted, without a change in the right-of-way.

On cross-examination, Mr. Schofer acknowledged that it might be possible to address some of the garage conflicts he raised with operational solutions. *See id.* at 102-103.

3. Kenneth C. Doggett, land planner. Tr. Sept. 9 at 111-145.

Mr. Doggett was designated an expert in land planning. He opined that the design currently proposed would be inconsistent with the Sector Plan and incompatible with the neighborhood.

Mr. Doggett testified that the PD-44 Zone has no setback, lot coverage or FAR requirements, so the function of the green area requirement is to act as a constraint on what can be built. He suggested that in theory, a building with a flat roof could be built out to the lot lines with all of the green area on the roof, and it has often been done. In Mr. Doggett's view, from a planning perspective, green area should always be on the ground, not on the roof, so that the entire development can benefit from the green area, as well as neighbors in the community. Mr. Doggett reviewed textual binding element 8 on the Development Plan, which states that "[a]ll green areas (including active/passive recreation rooftop green area) will be accessible to all residents or occupants of the buildings." He questioned whether occupants of the church and community center building would actually be able to use the rooftop green space, which would be on the proposed residential building. Mr. Doggett does not consider it feasible to keep the rooftop open to, for example, people who are playing basketball in the new community center. In his view, residents of the multi-family building who are relaxing by the pool would not want an entire basketball team to show up at the pool.

Mr. Doggett offered a definition of "compatible" from Webster's dictionary: compatible means capable of existing or operating together in harmony without negative impacts on other components. Tr. Sept. 9 at 115. In the present case, Mr. Doggett identified three compatibility failures: compatibility with the adjacent residential homes, isolation and compatibility with other homes in the area, and internal compatibility of the proposed buildings to the site. He addressed each in turn.

Mr. Doggett described the scale of the development proposed on the subject site as the primary compatibility problem with the adjacent and nearby houses. *See id.* at 116. Referring to the scale model of the proposed development, he observed that there would be very little relationship between the houses on Glenbrook, Rugby and even Old Georgetown Road and the massive buildings next to

them. He acknowledged that the building had been moved back to create a larger setback from the Wash residence, but described that as a very small improvement. *See id.* at 125. Mr. Doggett suggested that the model is quite kind in depicting the proposed residential building, because it does not show balconies that would stick out from the building, with a view down on the nearby homes.

In addition to the mass and height of the proposed buildings not being compatible with existing homes, Mr. Doggett considers the likely traffic and noise increases incompatible. He acknowledged that the traffic is acceptable from a technical point of view, but suggested that the proposed development would cause incompatible increases in the level of activity on Rugby Avenue and Glenbrook Road. In his view, a seven or eight foot fence would not block light from vehicles of buildings. For the closest home on Glenbrook, in particular, there would be no protection from the glare emanating from the multi-family building.

Mr. Doggett opined that the subject site is just too small to provide for a reasonable transition between the single-family homes and a high-rise building. In his view, an appropriate transition would require a medium-sized building or extended open space. He contended that single-family home residents expect a degree of privacy, which they would not receive with a multi-family high-rise looking down on them. Apartment dwellers, on the other hand, do not have the same expectation of privacy. They expect to share things.

Mr. Doggett disagreed strongly with Technical Staff's suggestion that the residential enclave adjacent to the subject site should be replaced over the long term – he interpreted this as a suggestion that the homes should be permitted to deteriorate, something he has never seen suggested for a stable residential neighborhood like this one. *See id.* at 121. Mr. Doggett stated that there has been a lot of renovation in this little neighborhood, and some homes are quite small, but they are in extremely good, stable condition and are not deteriorating. He noted that three of the homes have recently been sold for \$1.6 million and above, showing the ongoing value of these houses.

Mr. Doggett argued that a PD-44 development could coexist with the stable, residential community adjacent to this site if it were done at a different scale. As currently proposed, he opined, the buildings are too large and too close to the houses. He noted that the impact of the multi-family building's height would be increased by a drop-off in grade going down Rugby Avenue. *See id.* at 137. Moreover, he argued, a building of the size of the proposed multi-family building would isolate the houses on Rugby and Glenbrook, which already have larger buildings nearby. Mr. Doggett drew the distinction that the existing nearby buildings are at a scale that is quite pleasant, three to four stories for the most part, except for the high rise on Battery Lane that is visible through the trees. He noted that the existing larger buildings are well screened, with the exception of the first station, which is not tall, but lacks any screening at all.

Turning to the question of internal site compatibility, Mr. Doggett opined that the proposed project is too intense for the site. *See id.* at 131. He suggested that without the church and community center, 107 multi-family units could be laid out on the site quite reasonably. He finds the proposed layout tremendously compressed, and would consider it extremely difficult to successfully design a project that incorporates the church and residential uses at the densities proposed. *See id.* at 138. Mr. Doggett believes that using rooftop green area to get your zoning is not sound planning. He argued that green roofs are an environmental feature, and sometimes a tax factor, but are rarely used to get a zoning through. Mr. Doggett finds the current site layout, on the other hand, to be quite good in terms of preserving the houses south of Old Georgetown Road. *See id.* at 137. The church is a dominant feature, especially the spire. Mr. Doggett suggested that with the two new buildings on almost the same line as the church, the spire would be barely noticeable for people driving by.

Mr. Doggett stated that setbacks are always calculated from right-of-way lines, not curb lines, and he believes that was the intention of the Sector Plan regarding the 60-foot setback from Old

Georgetown Road. *See id.* at 132-33. He opined, moreover, that insufficient evidence was presented to provide that the needs of the church really require intruding into the setback area. *See id.* at 142.

Mr. Doggett considers the day care center courtyard/playground area inappropriately hemmed in by tall buildings on three sides. He argued that the proposed buildings would also create a barrier between the houses on Rugby and Glenbrook and the houses across Old Georgetown Road, which currently have a connection. In his view, if this development is approved it will be a signal that the nearby homes should be sold. Mr. Doggett noted that in his tour of the neighborhood, he saw no commercial signs on any of the houses across Old Georgetown Road from the subject site.

In response to a question from the Hearing Examiner, Mr. Doggett agreed that in reality, there are more houses across the street on Old Georgetown Road than the two that are shown on the scale model. He explained that originally there were not plans to show the other side of Old Georgetown Road, but when he saw that the Sector Plan specifically addresses those homes, Mr. Doggett asked the model maker to provide two typical houses.

Mr. Doggett observed that the site has some fine trees, all of which would have to come down to accommodate the level of development currently proposed. *See id.* at 136-37.

Mr. Doggett opined that housing can be compatibly built in close proximity to a church, using as an example a church two blocks from where he lives, on Wisconsin Avenue and Observatory Circle in Washington, D.C. *See id.* at 139. Mr. Doggett presented two photographs of the church and adjacent apartment buildings, which are reproduced below. He stated that the church was running into financial problems and sold part of its land to a developer who built a four-story building. The church spire remained the dominant feature, and they created a garden in the front, and facilities for the church to have a homeless shelter and indoor recreation space, but not a big basketball court. Mr. Doggett offered this example to suggest that the type of development proposed here could be done compatibly,

but on a more modest scale. He noted that the buildings could perhaps be slightly taller than in the example he cited, but without the massiveness currently proposed.

4. Sara Gilbertson, President, Battery Park Citizens Association. Tr. Sept 9 at 146-172.

Ms. Gilbertson is the President of the Battery Park Citizens Association, which has approximately 150 homes south of Old Georgetown Road. She was previously Vice President for two years. Her house is on Battery Lane, two doors from Old Georgetown. She is familiar with the proposed plan for the subject property, but stressed that neither she nor Steve Teitelbaum, the immediate past President, ever met with the Applicants about the project. *Id.* at 147.

Ms. Gilbertson stated that the entire Association is ‘universally unhappy’ with the proposed project as it has been presented thus far. *Id.* at 147. She conceded that the Association did not take a formal vote on this question, but everyone she has spoken to about it is opposed. *See Id.* 152-53. She noted that her Association has not chosen to take votes on land use matters.

Ms. Gilbertson declared that homes in Battery Park, including on Old Georgetown Road, are not permitted to have commercial signs. It is her job to make sure there are none, and she is positive that none currently exist. *See Id.* at 147-148.

Ms. Gilbertson noted that there is a “beautiful gym” at Bethesda Elementary School, where a number of groups play basketball. *See Id.* at 148.

Ms. Gilbertson also mentioned a new building on Arlington Road in the Edgemoor Area as a good example of a moderately-sized building transitioning to single-family housing. She argued that blocking the view of the church steeple from all directions except straight out front diminishes its impact.

5. Herbert Estreicher, next-door neighbor. Tr. Sept. 9 at 173-194.

Mr. Estreicher resides at 8008 Glenbrook Road, adjacent to the subject property. His property would face the community center to one side and a wing of the residential building to the rear, if they were to be built. *See* Tr. September 9 at 173.

Mr. Estreicher noted that several homes along Glenbrook and Old Georgetown Road, including his, have sold for between \$1.6 - \$1.8 million. His next door neighbors would like to build a larger home on their property, but have hesitated because of this project. Mr. Estreicher objects to Technical Staff designating his neighborhood for renovation, and treating it like a “throw-away” neighborhood. *Id.* at 174-175. He opined that this is not a throw-away neighborhood, and stated that not one family on either Glenbrook or Rugby supports this proposed plan, except for one who is a church member and has taken a neutral position. *Id.* at 174-175, 179. Mr. Estreicher stated that his neighborhood is lovely, including the homes across Old Georgetown Road, and it deserves to be preserved. *See Id.* at 182.

Mr. Estreicher called the office building at the corner of Glenbrook and Old Georgetown Roads as “ugly as sin”, but suggested that this does not justify putting a monstrosity next to it. He noted, moreover, that a large parking lot separates that office building from the adjacent home, with a distance between them of at least 110 feet, much more of a buffer than the Applicants propose for Mr. Estreicher’s home. *Id.* at 175.

Mr. Estreicher considers it completely unacceptable that the space from his property to the community building is only some 40 feet in distance, and from the residential building to his home is approximately 20 feet. His home is four stories, and the basement is on a sub-level, where all the windows would look out onto the community center and residential buildings. His patio, his favorite part of the house, where he sits and walks, would look right at condominium windows. Further, he would be under constant viewing from the residential building windows. Mr. Estreicher notes that the bedrooms of his home are on the third floor, and that the windows from the community and residential buildings will be able to look right into his home. He opines that he will not be able to use his patio

anymore and will have to move his furniture to the front of his home, away from the rear and side where he now has his main living space. *See Id.* at 177-179.

Mr. Estreicher stated that the proposed project is at the wrong scale for this location, and that other plans could be appropriate for the site, without putting such massive edifices next to single-family homes. *See Id.* at 180.

Mr. Estreicher stated that when he purchased his home in November of 2006 from Kohler Builders, for approximately \$1.6 million, he was not made aware of the plans for the subject property. *See Id.* at 185. He emphatically declared that he would never have purchased his property, had he known of the “monstrosity” being built next to it. He noted that he purchased his 6,000+ square foot home in this particular area because of its proximity to the Metro station. *See Id.* at 186.

Mr. Estreicher acknowledges that there is a two-story house adjacent to his home, and he looks at the wall of the house right from his balcony, but notes that he still can see daylight. *See Id.* at 187. Looking north of his home, Mr. Estreicher has a seven foot high fence that surrounds the sides and back of his property. *Id.* at 188. He stated that despite the tall office building across Glenbrook, currently his predominant view is of the sky, trees and open air. *Id.* at 191. He opines that a seven foot privacy fence will not protect him from a 114 foot tall building, and that he is worried how the development will affect his yard. *Id.* at 192-194. He does not understand how the green roof will provide vegetation or landscaping, but he does know that several old growth trees will be eliminated. *Id.* at 195.

6. Patsy Wolfe, Glenbrook Road resident. Tr. Sept. 9 at 195-201.

Ms. Wolfe resides at 8012 Glenbrook Road, three houses away from the subject property. *See* Tr. September 9 at 195-96.

Ms. Wolfe passionately discussed the neighborhood in which she lives. She stated that 70 percent of the residents on Glenbrook and Rugby own and live in their own homes, and have no intention of leaving anytime soon. She stated that her neighborhood, the neighborhood surrounding the

subject property, is not a throw-away, or tear down, or a transient place, but a true neighborhood. *See Id.* at 197.

Ms. Wolfe observed that the neighborhood is a blend of people, from young professionals to empty nesters to grandparents. They all know each other, socialize together, say hello and chat with each other. She identified the other 30% of the neighborhood as renters, one of whom has been there for 14 years. She stated that even the renters care for their rental property like a home and are very concerned about the proposed development on the subject property, which would be very sad for them. *See Id.* at 198. Ms. Wolfe fears that the project will have an adverse impact on the neighborhood, partly because of increased traffic which will reduce safety. She expects that interaction between the single family homes and the residents of the condominium would be non-existent. *Id.* at 200-201.

Ms. Wolfe acknowledged that in the last year she and her husband had bought a 1936 home in the neighborhood, in addition to their own home, to make sure it wouldn't get torn down, and resold it, even with the present application pending *See Id.* at 199.

Ms. Wolfe does not support the re-zoning application or the proposed project on the subject property.

7. Bernard Wolfe, Glenbrook Road resident. Tr. Sept. 9 at 201-204.

Mr. Wolfe resides at 8012 Glenbrook Road, three houses away from the subject property with his wife, Patsy. *See* Tr. September 9 at 195.

Mr. Wolfe is very concerned about traffic safety, particularly when he walks with his grandson to Battery Park. He stated that the Park is a very busy place, and will be even busier after upcoming renovations. However, there are five different street entrances converging at the intersection of Glenbrook, Rugby and Norfolk streets, and it is sometimes very difficult to get across the streets, especially during peak traffic hours. *See Id.* at 202. Mr. Wolfe worries that the proposed project will bring increased traffic and congestion creating more safety issues.

Mr. Wolfe opined that the neighborhood is not transitional, it is a solid neighborhood. Further, he stated that he was never notified of any developments or potential developments, when he purchased his home from the developer. *See Id.* at 203-204. He loves his neighborhood and plans to stay for a long time.

8. Shawn Russell, Glenbrook Road resident. Tr. Sept. 9 at 204-209.

Mr. Russell resides at 8014 Glenbrook Road, four houses away from the subject property, at the corner of Rugby and Glenbrook. *See* Tr. September 9 at 204.

Mr. Russell's concerns are public safety, traffic congestion, noise and compatibility with the proposed structures. He noted that the traffic is very heavy at peak times, during the morning and evening commutes, and the streets are very narrow. Mr. Russell disputes any traffic report that declares Glenbrook is not a cut through to get to Bethesda. He is concerned that if the proposed plan is allowed, that would add two additional entrances onto and off of property in the neighborhood, which would increase traffic. *Id.* at 205. Mr. Russell added that he also takes his young daughter to Battery Park during rush hour and has to dodge traffic, as people are darting around. *Id.* at 206-207.

Mr. Russell argued that the size of the proposed project does not fit the neighborhood, as it is too big, with no transition. He stated that this small, vibrant community, with all the families in it, will be subjected to increased traffic and that is a public safety issue. He also takes issue with the loss of green space, trees, and sunlight, because of the over-building proposed. *Id.* at 207.

Mr. Russell purchased his home in April of 2007. He was not made aware of this application for re-zoning. He did know that he was moving to a more congested area near a Metro, but did not have knowledge of the pending project. Mr. Russell acknowledged that he did not investigate whether there were any developments planned in the neighborhood. *See Id.* 208-209.

9. Steven Teitelbaum, Battery Park resident. Tr. Sept. 9 at 209-220.

Mr. Teitelbaum resides at 7813 Exeter Road, south of Old Georgetown Road, five houses down from the corner of Old Georgetown and Glenbrook Roads. *See* Tr. September 9 at 210, Ex. 346.

Mr. Teitelbaum has lived in his Battery Park neighborhood for 18 years. He sees the neighborhood as being very stable noting that it has existed for 70 years. Mr. Teitelbaum considers the proposed project fundamentally flawed because it is not compatible with the existing single family homes in the area. The proposed buildings are too massive in bulk and height for the site and surrounding neighborhood, and will also cause increased traffic. *See Id.* at 211.

Mr. Teitelbaum stated that even the Planning Board didn't consider the proposal compatible, but stated that the "compatibility issue can be more effectively addressed at site plan than at rezoning." *See Id.* at 211-212. He stated that the Planning Board saw past the "white wash" job in the Staff report.

Mr. Teitelbaum argued that the re-zoning should be rejected based on the height, bulk and mass of the project, which is completely out of keeping with the single-family residential neighborhoods. He noted that the only buffer for Battery Park would be distance, but the distance is minimal. Further, regarding property lines and such, he stated that because of the 'postage sized' lots in Battery Park and surrounding neighborhoods, sometimes neighbors haggle over inches, where in this project there is encroachment of several feet into the setback space. *Id.* at 212-213.

Mr. Teitelbaum maintained that Bethesda development has demonstrated that we know how to do transitional buffers better than this. He cited the Edgemoor area along Arlington Road is an example of a business area where homes are buffered by more modest developments. Mr. Teitelbaum suggested that the Battery Park neighborhood should be afforded the same respect in planning. He argued that this proposal is out of keeping with the master plan goal of maintaining a low-rise, residential feel on Old Georgetown Road, even as it becomes more institutional. *See Id.* at 213. He cited a church and synagogue, up one-tenth a mile on Old Georgetown, which were renovated within the last few years and did not overwhelm the neighborhood as this proposed project would. Mr. Teitelbaum noted that

the Sector Plan does not cite the 7979 Old Georgetown Road (the 11-story office building) as the standard of compatibility with the surrounding neighborhood. *Id.* at 213-214. He asks the County to use its planning expertise to do right by the community that County leaders are bound to protect. *See Id.* at 214.

Mr. Teitelbaum opines that there are many items in the proposed plan that are good and will benefit the community, however, it can be done in a manner more respectful of compatibility with the surrounding neighborhood. *Id.* at 214-215.

When Mr. Teitelbaum was President of the Battery Park Citizens Association from May 2006 to May 2008, he did not hear from a single resident who liked the proposed project on the subject property, but heard from many who opposed it. Further, all the letters that did come from the neighborhood were not solicited by the citizens association. *Id.* at 215.

Mr. Teitelbaum recalls being at a community meeting, before he became president of the citizen's association in May, 2006, when the Applicants made a presentation about the project. He also recalls an open session about the project at the church in spring of 2007. He testified that neither he nor Sara Gilbertson, the current president of his citizen's association, has had any direct discussions about the project with the church. *See Id.* at 218.

10. William Doggett, architect and Glenbrook Road resident. Tr. Sept. 9 at 220-232.

Mr. Doggett (no relation to Kenneth Doggett, Opposition land planner) resides at 8011 Glenbrook Road, three houses down from the subject site on the other side of Glenbrook, having purchased his home in November, 2006. Mr. Doggett has been a licensed architect for 33 years, and has had his office in Bethesda for the last 25. His practice is primarily commercial, and includes schools, churches, some residential, additions and alterations to commercial office buildings and new office buildings. Mr. Doggett stated that he is engaged by clients to do the same kind of thing as proposed here, so he knows "both sides of this table." Mr. Doggett opposes the proposed project

because of the height and bulk of the proposed buildings. He stated that the church would be almost totally overshadowed by the other buildings, except from Old Georgetown Road. Mr. Doggett described the proposed development as “so non-conforming . . . that it’s not laughable. It’s terrible.” Tr. Sept. 9 at 223-224. He declared that he has not studied the proposed design and does not need to because of the height -- 114 feet plus the effect of topography – and bulk.

Mr. Doggett measured Glenbrook Road on the day of the hearing at twenty feet eight inches wide, which he described as not enough for two cars to pass, even without parking. He noted that parked cars have been side-swiped by passing traffic, and that when cars are parked on the street and two cars need to pass, one of them has to pull over. With the speed of cut-through traffic, Mr. Doggett considers it a safety issue. He loves living in this neighborhood, and understands that cut-through traffic and neighborhood traffic are something he has to accept. He cannot imagine, however, additional traffic using Glenbrook Road to get to and from the subject site.

Mr. Doggett observed that the church and its activities have been very respectful of the neighborhood, which he would expect from a church. He noted that the tall office building on the corner of Glenbrook Road is much more respectful of the neighborhood than would be the “massive sprawling development” proposed around the church; it has more space around it, more green space at street level, and a street presence, whereas the proposed development does not have street presence, and is not at a scale that respects pedestrians or residents in the single-family dwellings. He argued that street presence is not accomplished just by doors that open at the ground level, but involves other features such as street-level landscaping that this plan doesn’t have room for because the building footprints are so great. The tall office building, moreover, was built probably 30 years ago and is part of the fabric now. In Mr. Doggett’s view, the development proposed here will never be part of the fabric even if it is approved. *See id.* at 225.

Under cross-examination by Mr. Brown, Mr. Doggett noted that the church spire would be slightly higher than the proposed 114-foot building, but the church as a whole would be dwarfed by the two massive, block-shaped buildings proposed. Drawing on his experience with church architecture, Mr. Doggett testified that the function of the church spire goes back to early church architecture, when the spire was a symbol of the church presence. *See id.* at 228-29. He acknowledged that the proposed buildings are shown with some nice articulation, but opined that the overall bulk is just too massive for the church and the neighborhood. *See id.* at 228. He contrasted this with the current church, which has a scale, spacing, setbacks and landscaping that are much more acceptable and welcoming for the community.

Under cross-examination by Mr. Kaufman, Mr. Doggett acknowledged that he had not measured the green spaced proposed here to compare it to the green space around the tall office building on the corner of Glenbrook. *See id.* at 230. He noted that that the tall office building has green space along Glenbrook Road and a little bit against the building edge, as well as a green, landscaped area next to the parking lot. He accepted Mr. Kaufman's representation that the Development Plan provides for over 90 percent of the required 50-percent green area on the ground, but stated that because of the height and bulk of the proposed buildings, "little strips of grass around a huge height and bulk really doesn't do much." Tr. Sept. 9 at 232.

Mr. Doggett is aware of the nine-story building that has been approved right behind his house, which would be much closer than the development proposed in this case. He did not oppose that project because he was not living in his current house when the preliminary plan application was filed. Fortunately, he noted, he has some cypress trees on his side of the fence that will shield him from some of that. *See id.* at 232.

11. Jim Humphrey, Montgomery County Civic Federation. Tr. Sept. 9 at 252.

Mr. Humphrey argued on behalf of the Civic Federation the proposed buildings would not be compatible with adjacent and confronting single-family detached homes, that the community center building would not conform to the setback recommended in the Sector Plan for a building of its height, and that the internal vehicular circulation systems and external driveway accesses for the proposed project are not safe or adequate, as currently proposed. *See* Ex. 348.

Mr. Humphrey emphasized the importance of master plan recommendations in a PD Zone case. He pointed out that the Sector Plan included language in its recommendations for the subject site noting that any rezoning application should be reviewed to determine compatibility with existing single-family homes, both north and south of Old Georgetown Road. Mr. Humphrey's contentions regarding the Sector Plan height recommendation applicable to the subject site are discussed in Part III.G above. He added that the Battery Park neighborhood across the street from the subject site is outside the area covered by the 1994 Plan or the Sector Plan, but both the 1994 Plan and the Sector Plan designate a 35-foot height limit adjacent to or confronting existing residential edge neighborhoods for all but a few, small portions of the edge of the plan area, as an appropriate transition height. *See* Ex. 348 at 2. This, he noted, is consistent with language in the Sector Plan stating that its height recommendations were designed to protect the neighborhoods at the edges of the CBD and concentrate building height near the Metro.

Mr. Humphrey stressed that the Civic Federation is concerned about lack of compatibility both for the homes on Glenbrook and Rugby and for the homes across Old Georgetown Road from the subject site, which are outside the Sector Plan and 1994 Plan area. He contended that currently, building heights on the 1994 Plan edge confronting or adjacent to homes in Battery Park have been kept to the 35-foot maximum building height recommended in the Sector Plan.

Mr. Humphrey also took guidance from language in the 1994 Plan recommending a three-story height limit for a property on Arlington Road that confronts single-family homes across the Capital

Crescent Trail. *See* Ex. 348 at 3. Hearing Examiner Carrier noted that there are significant differences in the two neighborhoods and that the 1994 Plan is quite a bit older than the Sector Plan at issue in this case. She therefore considered the reference to it to be inapposite to the present case.

Mr. Humphrey noted that with a single main entrance into the garage off of Old Georgetown Road, church users and day care center customers will require access through the garage under the proposed multi-family building. He argued that this calls for a textual binding element stating that Bozzuto will grant the church a perpetual access easement for use of the Old Georgetown Road driveway and the garage, and an agreement that a certain number of parking spaces will be reserved for church use. He also suggested that Bozzuto might request an easement for moving vans to be used in the loading dock area, which would be on property owned by the church. The Hearing Examiner does not recommend approval of the present application, but is confident that if the application is approved, the church and its developer will work out the necessary cross-easements to make the garage and both of its access points accessible to all parties using the site.

Mr. Humphrey raised an additional concern about access to the site via Rugby Avenue. At the outset of the public hearings in this case, the Applicants proposed to install “grasscrete” (a type of paving that allows grass to grow up in between the pavers, so that most drivers of ordinary vehicles would not want to drive over the surface) in the curve of the road between Rugby Avenue and the garage entrance, so that emergency vehicles would be able to go through the site, but no one else. When the effectiveness of this plan to deter cut-through commuters was met with some skepticism, the Applicants decided to eliminate the grasscrete and instead use a card-operated access gate, so that building residents would be able to go in and out of the garage via Rugby Avenue (as well as, presumably, emergency vehicles) but no one else would be able to get through. *See* Ex. 348 at 5.

Mr. Humphrey argued that the availability of garage access from Rugby Avenue would generate a greatly increased volume of traffic on Rugby Avenue. He contended that residents traveling into

Bethesda likely would use Rugby Avenue as their main route in and out of the site, due to the difficulty of turning left on Old Georgetown Road from the site, particularly during the morning and evening rush hours. Mr. Humphrey fears that this would increase the possibility of pedestrian accidents in this relatively quiet residential area, as well as at the unsignalized, oddly-shaped, five-way intersection between Rugby Avenue, Glenbrook Road and Norfolk Avenue. He concluded that the proposed access and circulation would not meet the “safe, adequate and efficient” standard established in the Zoning Ordinance. *See* Ex. 348 at 5.

V. ZONING ISSUES AND REQUIRED FINDINGS

The subject application seeks to rezone the property from the R-60 Zone to the PD-44 Zone. The PD-44 Zone falls into a category known as “floating zones.” A floating zone is a flexible device that allows a legislative body to establish a district for a particular type of use, with land use regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location is appropriate for the zone, *i.e.*, it satisfies the purpose clause and requirements for the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

PD (Planned Development) zones are a special variety of floating zone with performance specifications integrated into the requirements of the zone. These zones allow considerable design flexibility if the performance specifications are satisfied. The applicant is not bound to rigid design specifications, but may propose site-tailored specifications, within the parameters established for the zone, for elements such as setbacks, building heights and types of buildings. These specifications are set forth on a development plan to facilitate appropriate zoning oversight by the District Council.

Pursuant to Zoning Ordinance §59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone. Once it is approved, the development plan provides the design

specifications for the site, much as the Zoning Ordinance provides design specifications for more rigidly applied zones. Accordingly, the evaluation of zoning issues must begin with the Development Plan and proceed to the requirements of the zone itself.

Before approving a development plan, the District Council must make five specific findings set forth in Code § 59-D-1.61. These findings relate to consistency with the master plan and the requirements of the zone, compatibility with surrounding development, circulation and access, preservation of natural features, and perpetual maintenance of common areas.

Because the general requirement of the law – that the application must fulfill the “purposes and requirements” of the new zone – is subsumed in the language of the five specific required findings, a determination that the five findings have been satisfied would satisfy the Montgomery County Zoning Ordinance. However, in addition to these five findings, Maryland law also requires that the proposed rezoning be in the public interest. As stated in the State Zoning Enabling Act applicable to the County, all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [Regional District Act, M-NCPPC Article (Art. 28), Md. Code Ann., § 7-110].

In sum, there are six findings required (§59-D-1.61(a) through (e) and the public interest). The “Required Findings” are discussed below in the order set forth in the statute to facilitate review. Based on this review, the Hearing Examiner concludes that the evidence in this case supports some, but not all, of the required findings.

A. Review of the Development Plan

a. The first required finding relates to consistency with the Sector Plan and other County policies:

(a) The proposed development plan is in substantial compliance with the use and density indicated by the master plan or sector plan, and that it does not conflict with the general plan, the county capital improvements program or other applicable county plans and

policies. However:

(1) *To permit the construction of all MPDUs under Chapter 25A, including any bonus density units, on-site in zones with a maximum permitted density more than 39 dwelling units per acre or a residential FAR more than .9, a development plan may exceed:*

(A) *any dwelling unit per acre or FAR limit recommended in a master plan or sector plan, but must not exceed the maximum density of the zone; and*

(B) *any building height limit recommended in a master plan or sector plan, but must not exceed the maximum height of the zone.*

*The additional FAR and height allowed by this subsection is limited to the FAR and height necessary to accommodate the number of MPDUs built on site plus the number of bonus density units. . . .*³³

As is evident from the analysis in Part III.F.5. of this report, the Hearing Examiner finds that the proposed development plan is not in substantial compliance with the recommendations of the Sector Plan as to height and compatibility. However, that is not quite the same as saying that the development plan is not in substantial compliance with the “use and density” recommended in the Sector Plan, which is the required finding in this section.

The Hearing Examiner finds that a multi-family development under the PD Zone does coincide with the use proposed in the Sector Plan, which recommends PD-44 for the subject site. Moreover, the evidence produced by Applicant and discussed in Part III. F. of this report indicates that the Council, when it approved the Sector Plan Amendment in 2006, was aware of the church’s desire to remain on the site and continue its programs there. Thus, it is fair to say that the continued church use was also contemplated in the Sector Plan.

On the other hand, the appropriate density of this site’s development is clearly an issue in this case. While it is tempting to say that the proposal calls for precisely the density recommended for the site – PD-44 plus a 22% bonus for MPDUs – that would not be a fair conclusion because it ignores the repeated provisos in the Sector Plan conditioning its PD-44 recommendation upon compatibility with the single-family development in the area, and that condition is a limiting factor on the Sector Plan’s

³³ The remaining language of this provision addresses additional height and density based on the inclusion of on-site workforce housing. That language is inapplicable in this case because no workforce housing is proposed.

recommendation of density. The Sector Plan does not baldly say it recommends densities permitted in the PD-44 Zone; rather, it says, “This Plan recommends PD-44 zoning provided that issues of compatibility with existing single-family homes can be addressed.” [Emphasis added.] See Sector Plan at p. 23. The Hearing Examiner finds that Applicant has not sufficiently addressed these compatibility problems, which would require a reduction in its proposed density, and therefore the proposal is not in substantial compliance with the density recommendation in the Sector Plan.

On the positive side, the Hearing Examiner finds that the Development Plan does not conflict with other county plans or policies, or the capital improvement program. It would provide affordable housing near a Metro stop, and as discussed in Part III.G. of this report, would be consistent with the applicable Growth Policy.

b. The second required finding requires an evaluation of the PD Zone’s purpose and regulations:

(b) That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.

1. Purposes of the Zone

The purpose clause for the PD Zone, found in Code §59-C-7.11, is set forth in full below, followed by relevant analysis and conclusions for each paragraph:³⁴

[1] It is the purpose of this zone to implement the general plan for the Maryland-Washington Regional District and the area master plans by permitting unified development consistent with densities proposed by master plans. It is intended that this zone provide a means of regulating development which can achieve flexibility of design, the integration of mutually compatible uses and optimum land planning with greater efficiency, convenience and amenity than the procedures and regulations under which it is permitted as a right under conventional zoning categories. In so doing, it is intended that the zoning category be utilized to implement the general plan, area master plans and other pertinent county policies in a manner and to a degree more closely compatible with said county plans and policies than may be possible under other zoning categories.

[2] It is further the purpose of this zone that development be so designed and constructed as to facilitate and encourage a maximum of social and community interaction and

³⁴ Numbering of the paragraphs has been added by the Hearing Examiner for ease of reference.

activity among those who live and work within an area and to encourage the creation of a distinctive visual character and identity for each development. It is intended that development in this zone produce a balance and coordinated mixture of residential and convenience commercial uses, as well as other commercial and industrial uses shown on the area master plan, and related public and private facilities.

[3] It is furthermore the purpose of this zone to provide and encourage a broad range of housing types, comprising owner and rental occupancy units, and one-family, multiple-family and other structural types.

[4] Additionally, it is the purpose of this zone to preserve and take the greatest possible aesthetic advantage of trees and, in order to do so, minimize the amount of grading necessary for construction of a development.

[5] It is further the purpose of this zone to encourage and provide for open space not only for use as setbacks and yards surrounding structures and related walkways, but also conveniently located with respect to points of residential and commercial concentration so as to function for the general benefit of the community and public at large as places for relaxation, recreation and social activity; and, furthermore, open space should be so situated as part of the plan and design of each development as to achieve the physical and aesthetic integration of the uses and activities within each development.

[6] It is also the purpose of this zone to encourage and provide for the development of comprehensive, pedestrian circulation networks, separated from vehicular roadways, which constitute a system of linkages among residential areas, open spaces, recreational areas, commercial and employment areas and public facilities, and thereby minimize reliance upon the automobile as a means of transportation.

[7] Since many of the purposes of the zone can best be realized with developments of a large scale in terms of area of land and numbers of dwelling units which offer opportunities for a wider range of related residential and nonresidential uses, it is therefore the purpose of this zone to encourage development on such a scale.

[8] It is further the purpose of this zone to achieve a maximum of safety, convenience and amenity for both the residents of each development and the residents of neighboring areas, and, furthermore, to assure compatibility and coordination of each development with existing and proposed surrounding land uses.

[9] This zone is in the nature of a special exception, and shall be approved or disapproved upon findings that the application is or is not proper for the comprehensive and systematic development of the county, is or is not capable of accomplishing the purposes of this zone and is or is not in substantial compliance with the duly approved and adopted general plan and master plans. In order to enable the council to evaluate the accomplishment of the purposes set forth herein, a special set of plans is required for each planned development, and the district council and the planning board are empowered to approve such plans if they find them to be capable of accomplishing the above purposes and in compliance with the requirements of this zone.

First Paragraph: Master Plan Implementation.

The first paragraph establishes consistency with the applicable master plan as an important factor in applying the zone. For the reasons stated in Part III.F.5. of this report and in paragraph “a.” above, the Hearing Examiner concludes that the proposed development is not in substantial compliance with the Sector Plan. At 78 feet, the proposed church/community center building would exceed the 35-foot recommended height on Lot 4 by 123%, and it is hard to characterize that difference as substantially complying with the Sector Plan’s height recommendation. The development plan is also inconsistent with the compatibility requirements of the Sector Plan regarding nearby single-family homes, as discussed above, and is inconsistent with the general recommendation for “tenting” – *i.e.*, that building heights decrease from the CBD towards the residential edge.

Second Paragraph: Social and Community Interaction, Visual Character, Mix of Uses.

The proposed development would encourage social and community interaction by creating a courtyard area and green rooftop recreation area where building residents would have the opportunity to come together, and by enabling the church to continue providing worship, recreational and cultural opportunities that would be open to residents of the building and the wider community, as well as social services to people in need in the community. Many of the church activities would offer opportunities for social and community interaction. It thus would also provide a coordinated mixture of residential and institutional uses.

The proposed development would create a distinctive visual character, as suggested in the purpose clause, and it might well be appropriate in a different location; however, on this site, too much is placed too near single-family homes on both sides of Old Georgetown Road. As discussed at length in Part III. F. 5. of this report, the increased setbacks from the homes on Glenbrook Road and Rugby Avenue are a marked improvement in compatibility, but we are still talking about a very large structure to impose on the view of the nearby single-family homeowners. The view of the proposed structure

from across Old Georgetown Road would be monolithic, as demonstrated by the portion of the building context photographs reproduced on pages 55 and 56 of this report.

Third Paragraph: Broad Range of Housing Types.

This development would increase the stock of multi-family housing available in downtown Bethesda and create a new housing option on this part of Old Georgetown Road.

Fourth Paragraph: Grading and Trees.

Phil Perrine, Applicant's land planner, testified that there is an existing terrace, from Old Georgetown Road up to where the church is, and "that basic land form has been maintained." Tr. 2-22-10 at 117. Presumably, therefore, there will be little grading needed.

With regard to tree preservation, in the pre-remand Hearing Examiner's report, Ms. Carrier found that the removal of the two specimen trees on the site could not be reconciled with the PD-44 Zone's purpose to retain trees. *See* Pre-remand report at p. 138. A change in the law and tree-review practices since that report causes the Hearing Examiner to reach the opposite conclusion in this report.

Mr. Perrine testified, as did Applicant's architect, Michael Foster, that the two existing specimen trees do not appear to be flourishing in their setting. Given the condition of the trees, he opined that they should be removed and replaced with a species that is hardy and can withstand this kind of a setting. Tr. 2-22-10 at 117.

Mr. Perrine's opinion is supported by the Environmental Planning Division of Technical Staff, whose memorandum of January 27, 2010, is appended to the Technical Staff remand report as Attachment 10. Staff notes that under State law that went into effect on October 1, 2009 (*i.e.*, after the remand), removal of any specimen tree requires a "tree variance." Staff recommended approval of Applicant's tree variance request, noting that the County arborist had not objected; that one specimen tree is in poor health and the other is "a non-native invasive;" that neither is a champion tree; that many new or redevelopment applications will often necessarily and unavoidably result in a loss of a specimen

tree or trees; and that an alternate site layout would not alter the need for the removal of these two trees. Given the extensive tree review, the Hearing Examiner finds that the purpose of the PD-44 Zone has been accomplished in this regard.

Fifth and Sixth Paragraphs: Open Space and Pedestrian Networks.

Mr. Perrine testified that open space has been conveniently located in the revised plan for use by the community as a whole: The open space to the rear provides a buffer or transition between the proposed buildings and the closest residences, as well as a play area for the day care center and seating area for the residential building. He considers the open space now proposed at the rear of the site to be a considerable amount of open space at a location adjacent to a CBD. He noted that there is also a broad open space near the entrance to the church, appropriately located at the corner of Old Georgetown and Glenbrook. Tr. 2-22-10 at 107-120. There is also provision for a pedestrian connection between Rugby and Glenbrook, and from the residential building and the church/ community center building to the surrounding street sidewalk system. Tr. 2-22-10 at 122. The site's location in downtown Bethesda, places it near to countless shops, restaurants and other activities accessible within a short walk, which would encourage pedestrian activity.

Technical Staff agreed, stating (Remand Staff Report, Exhibit 385, p. 4),

The increased setbacks create a large open space with a landscaped park/garden, including a fenced playground area for the daycare and a pedestrian path to allow citizens to walk through the church property from Rugby Road [sic] to Glenbrook and Old Georgetown Roads. . . .

The Glenbrook Road façade of the church/community has been revised and now includes a semi-circular shape in order to provide open space at the northwest quadrant of Old Georgetown Road and Glenbrook Road.

Given this increase in available open space, the Hearing Examiner finds that Applicant's design has fulfilled the goals of the fifth and sixth paragraphs of the purpose clause.

Seventh Paragraph: Scale.

The PD Zone encourages, but does not require, development on a large scale. If anything, as

already discussed, the scale of the proposed development is too large for the area in which it is located.

Eighth Paragraph: Compatibility and Maximum Safety, Convenience and Amenity.

For the reasons stated in Part III.F.5. of this report and above in connection with the first and second paragraphs of the purpose clause, the Hearing Examiner finds that the proposed development would not be compatible with the immediate surrounding area due to the size and bulk of the new buildings in their setting nearby to single-family, detached homes.

The evidence demonstrates that the proposed development would provide a high degree of safety, convenience and amenity for site residents, with a convenient downtown location, and on-site amenities including a rooftop recreation area. It would also provide convenience and amenities for area residents generally, by allowing the church to continue providing worship, recreational and cultural opportunities open to the general public, as well as social services for people in need. The evidence also supports a conclusion that the proposed development would not be detrimental to the safety of the community, given the small number of vehicular trips projected on the narrow neighborhood streets.

Ninth Paragraph: Summary of Required Findings.

Paragraph nine of the purpose clause states that the PD Zone “is in the nature of a special exception,” and shall be approved or disapproved based on three findings:

- (1) the application is or is not proper for the comprehensive and systematic development of the county;
- (2) the application is or is not capable of accomplishing the purposes of this zone; and
- (3) the application is or is not in substantial compliance with the duly approved and adopted general plan and master plans.

This paragraph of the purpose clause does not add new requirements. Based on the preponderance of the evidence and for the reasons stated above, the Hearing Examiner concludes that present application is not proper for the comprehensive and systematic development of the County, is not in substantial compliance with the Sector Plan, and therefore would not accomplish some of the purposes of the zone.

2. Standards and Regulations of the Zone

The standards and regulations of the PD-44 Zone are summarized below, together with the grounds for the Hearing Examiner's conclusion that the proposed development would satisfy some, but not all of the applicable requirements.

Section 59-C-7.121, Master Plan Density. Pursuant to Code §59-C-7.121, "no land can be classified in the planned development zone unless such land is within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher." The subject property is recommended in the Sector Plan for residential development at a density of up to 44 units per acre, so this requirement is satisfied.

Section 59-C-7.122, Minimum Area. Code §59-C-7.122 specifies several criteria, any one of which may be satisfied to qualify land for reclassification to the PD Zone. The subject application satisfies the first of these criteria, which states the following:

That it contains sufficient gross area to construct 50 or more dwelling units under the density category to be granted.

The Hearing Examiner finds that the subject property contains sufficient gross area to permit the construction of 50 or more dwelling units.

Section 59-C-7.131, Residential Uses. All types of residential uses are permitted, but parameters are established for the unit mix. The residential portion of a PD-44 development with less than 200 units may, as proposed here, consist of 100 percent multi-family units.

Section 59-C-7.132, Commercial Uses. Commercial uses indicated on the applicable master plan are permitted in the PD Zone. Commercial uses are neither recommended for this site in the Sector Plan nor proposed in the Development Plan.

Section 59-C-7.133, Other Uses. This section provides, in relevant part,

(a) *Noncommercial community recreational facilities which are intended exclusively for the use of the residents of the development and their guests may be permitted.*

(b) Any nonresidential, noncommercial use may be permitted at the discretion of the district council on a finding that it is compatible with the planned development and satisfies the requirements of section 59-C-7.15.³⁵

In this case, Applicant proposes a church/community center building in addition to its residential building. While houses of worship may be permitted in all zones, the opposition has observed that §59-C-7.133(a) permits only noncommercial community recreational facilities which are intended exclusively for the use of the residents and their guests, and §59-C-7.133(b) requires a finding that the community center use would be compatible with the planned development and would satisfy the compatibility requirements of §59-C-7.15. *See* Tr. 2/22/10 at 271-272; Tr. 2/23/10 at 106-107 and 148; and Exhibit 388(b) at p. 5. The opposition argues that the proposed community center use clearly is designed for the use of non-residents (as well as residents) and that the amount of space on the site devoted to the community center use, when combined with the permitted residential use, results in excessive density on the site which is not compatible with its immediate neighbors.

Although Technical Staff did find the proposed development to be compatible with the surrounding area, it did not respond directly to the issues raised by §59-C-7.133, giving only the following description of the proposed use in connection with this section (Exhibit 383, p. 9):

The revised development plan includes razing the existing church, removing the existing buildings within which the church provides community services, and constructing a new church/community center building and a residential building. The community center will include church and non-profit office space, daycare, classrooms, and a multi-purpose facility for assembly and recreational use

The Applicant responded to the argument about §59-C-7.133 with the following paragraph (Exhibit 417(f), p. 4):

The Opposition also argues that “the notion that the church/community center is going to be well-integrated into the needs of the condo residents is undemonstrated”. To the contrary, in addition to the integration of the below-grade parking for both the church and residential uses, Pastor Tollefson testified at the public hearing that arrangements will be made to assure the sharing of facilities/amenities of the church/community center building and residential building through a written management agreement that

³⁵ The remainder of §59-C-7.133 addresses uses not sought in this case, and it is therefore not quoted here.

respects multiple users with different time schedules for the use of the church/community center (see Exhibit 404(a) and 404(b)).

The Hearing Examiner agrees that Applicant's plan for parking and shared use arrangements would facilitate the joint use of the site by the residents and the church/community center; however, that is not the same as finding that cramming all of these uses into this site so near to a neighborhood of single-family, detached homes is a compatible arrangement. For all the reasons discussed in Parts III.F.5 and V.A. above, the Hearing Examiner finds that the proposed development would not satisfy the compatibility requirements of §59-C-7.15(a), and therefore would not satisfy the requirements of §59-C-7.133.

Section 59-C-7.14, Density of Residential Development. The Zoning Ordinance provides the following direction for the District Council in considering a request for the PD Zone (§ 59-C-7.14(b)):

The District Council must determine whether the density category applied for is appropriate, taking into consideration and being guided by the general plan, the area master or sector plan, the capital improvements program, the purposes of the planned development zone, the requirement to provide [MPDUs], and such other information as may be relevant. . . .

The Zoning Ordinance classifies the density category applied for, PD-44, as a high-density planned development zone, which may be appropriate in an urban area. It is, moreover, the density recommended for the subject site in the Sector Plan. For reasons discussed above with regard to compatibility, while the zoning category may be appropriate, the combination of large buildings proposed for the site, which include church and community center uses, in addition to a residential use, would not be compatible with the immediate surrounding area.

Section 59-C-7.15, Compatibility. Section 59-C-7.15(a) provides:

(a) All uses must achieve the purposes set forth in section 59-C-7.11 and be compatible with the other uses proposed for the planned development and with other uses existing or proposed adjacent to or in the vicinity of the area covered by the proposed planned development.

This subsection requires that a proposed development be compatible internally and with adjacent uses. As discussed at length in Parts III.F.5 and V.A. above, the Hearing Examiner finds that the proposed development would not be compatible with existing development in the immediate surrounding area.

For the reasons set forth in discussed in Part III.F.4. of this report, Section 59-C-7.15(b) is inapplicable to this development, which is in close proximity to the Bethesda CBD.

Opposition counsel also argues that the parameters cited in this section should be used as a guide to compatibility, since the subject site abuts land that is currently zoned and used for residential purposes. *See* Ex. 359(a) at 17. The Hearing Examiner agrees with former Hearing Examiner Carrier's analysis on this point – these parameters apply to properties that are not in close proximity to a CBD because the expectation of privacy and open space must reasonably be lower in close proximity to a CBD. Thus, the full 100-foot setback and one-foot-per-foot-of-height limitations specified in §59-C-7.15(b) are not necessarily a fair guide to compatibility in this setting. Moreover, the appropriate setbacks depend in large part on the size of the building; lower buildings might be compatible without a full 100-foot setback. *See* Pre-Remand Report of December 15, 2008, p. 142. Thus, the setbacks specified in §59-C-7.15(b) should not be applied to this case, even as a guide to compatibility.

Section 59-C-7.16, Green Area. The PD-44 Zone requires a minimum of 50 percent green area. The Development Plan (Exhibit 417(a)) specifies that the development will meet this requirement by providing 45,918 square feet of green area out of a gross tract area (including the abandonment areas) of 87,417 square feet. This would amount to over 52% green area. Applicant's green space/[building] coverage exhibit (Exhibit 382(g)), diagrams and specifies green space and physical building coverage proposed for the site. It is reproduced on page 27 of this report.

Both Exhibits 417(a) and 382(g) specify that 4,000 square feet of the proposed green space will be on the roof of the proposed residential building. Exhibit 382(g) specifies that this amounts to 4%

rooftop green area and 48% at grade. There was some confusion at the hearing as to what percentage of the proposed green area will be on the roof. Applicant's architect, Michael Foster, indicated on cross-examination that 4% of the tract would be rooftop green area, but he admitted that that rooftop green area constituted 8.7% of the total green area. *See* Tr. 2/22/10 at 46-47. These statements may appear to contradict each other, but they are actually consistent. The 4% figure refers to the percentage of the gross tract area that will be rooftop green area, and the 8.7% figure refers to the percentage of the overall planned green area that will be rooftop green area.

The pre-remand Hearing Examiner's report of December 15, 2008, has a lengthy discussion (at pp. 142-146) relating to whether rooftop green area should be counted towards green area, as it is defined in the Zoning Ordinance. As Ms. Carrier noted, Technical Staff and the Planning Board interpret the Code definition to include areas on rooftops, and the legislative history does not indicate that the Council intended to prohibit green area from being located on a roof. Ms. Carrier concluded that the fundamental intent of the definition and the green area requirement was to provide useful outdoor recreation space for apartment dwellers, and that goal can be satisfied with a well-designed rooftop recreation area as well as on the ground. There was no new evidence presented in the post-remand proceedings that would lead the Hearing Examiner to modify that legal conclusion, and the Hearing Examiner hereby adopts it in the remand case. Having done so, the Hearing Examiner finds that Applicant's proposal meets the green area requirements of the PD-44 Zone.

Section 59-C-7.17, Dedication of Land for Public Use. This section requires that land necessary for public streets, parks, schools and other public uses must be dedicated to public use, with such dedications shown on all required development plans and site plans. The Development Plan shows the proposed dedications along Old Georgetown and Glenbrook Roads.

Section 59-C-7.18, Parking Facilities. Off-street parking must be provided in accordance with the requirements of Article 59-E of the Zoning Ordinance. As discussed in Part III.G. of this report, the

Development Plan provides for more than the required number of spaces for the residential use and for the church/community center.

The final two elements of finding “b,” the maximum safety, convenience and amenity of the residents, and compatibility, have already been addressed.

c. The third required finding evaluates access and site circulation:

(c) That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.

For the reasons discussed in Part III.G. of this report, the Hearing Examiner finds that the proposed internal vehicular and pedestrian circulation systems and points of external access would be safe, adequate, and efficient.

d. The fourth required finding evaluates environmental concerns:

(d) That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.

As discussed above in connection with paragraph four of the PD Zone’s purpose clause, grading will be minimized on the site and appropriate review has been given to the retention of trees. Former Hearing Examiner Carrier expressed concern about the plan to remove specimen trees from the site. Since the writing of her report, the State of Maryland has imposed additional requirements for justifying removal of specimen trees and requires “tree variances,” which have been recommended in this case by Technical Staff. Environmental Planning Division Staff have recommended approval of the revised preliminary forest conservation plan, as well.

As discussed in Part III.H. of this report, Technical Staff also noted that the stormwater management concept will be subject to the state’s new stormwater management standards, requiring environmental site design (ESD) to the maximum extent practicable. Staff supports deferral of the

formal stormwater management concept approval to later reviews. Remand Staff Report (Exhibit 385, p. 3).

Given the additional regulation protecting specimen trees and the uncontroverted evidence that forest conservation and water resource protection requirements would be adhered to, the Hearing Examiner finds that the record satisfies this required finding.

e. The fifth required finding pertains to ownership and maintenance of common areas:

(e) That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.

Applicant's ownership of the subject site is established in the record by the State of Maryland's real property tax records. *See* Exhibit 4. The Applicant has not provided any draft documents regarding perpetual maintenance of common areas, and therefore the Hearing Examiner cannot make an assessment regarding the adequacy of any such documents. In the pre-remand case, a representative of Bozzuto Homes, Inc. ("Bozzuto") a partner of former co-Applicant, BA Old Georgetown Road, LLC, testified that Bozzuto's affiliate and the church plan to enter into an agreement for shared use of the entire property, including maintenance of quasi-public areas. *See* Tr. 2-24-08 at 34-35. Reverend Tollefson also acknowledged the church's intention to enter into such an agreement. *See id.* at 55-56. Since BA Old Georgetown Road, LLC is no longer a co-applicant, the Hearing Examiner is not aware of any post-remand evidence in the record that addresses the question of future maintenance of common areas.

On the other hand, the required finding is worded so loosely as not to require any such evidence, but rather to ensure the adequacy of such documentation if it is provided. While it might be better to have such documentation in the record, the Hearing Examiner cannot find the record deficient for the lack of it, given the wording of the statute. Moreover, Reverend Tollefson's testimony should suffice to establish the church's intent to arrange for maintenance of the common areas.

B. Assessment of the Public Interest

The final finding which is required under Maryland law is that the proposed rezoning will be in the public interest. When evaluating the public interest, the District Council normally considers Master Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse impact on public facilities or the environment and public benefits such as provision of affordable housing.

It is clear from this record (mostly the pre-remand record) that Applicant does many good works in the community and would continue to do so if the rezoning and development plan are approved. Those good works are clearly in the public interest. Moreover, the provision of affordable housing is also clearly in the public interest. However, a finding that an Applicant's activities would be in the public interest is not the same as a finding that a rezoning would be in the public interest. The Maryland statute, quoted at the beginning of Part V of this report, specifies first that all zoning power must be exercised, "*. . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . .*" Thus, the public interest question, first and foremost, addresses the systematic development issue, which is embodied in consistency with master plans, or in this case, the Sector Plan. Furthermore, inherent in the concept of systematic and coordinated development is the requirement that a development be able to live in harmony with its neighbors.

These considerations were discussed at great length in Part III. F. of this report in connection with the Sector Plan and compatibility. Although both Technical Staff and the Planning Board found that the proposed development would be compatible and in substantial compliance with the Sector Plan, the Hearing Examiner found to the contrary. It is a much closer question in the post-remand scenario with regard to the abutting landowners because of the increased setbacks and redesign of the proposed buildings, but the problems created by excessive density on a small site next to single-family homes

cannot be overcome by the proffered changes. The Hearing Examiner therefore finds that the proposed rezoning and development would be inconsistent with the recommendations of the Sector Plan and therefore inconsistent with the public interest.

On the other hand, for the reasons stated in Part III.G., the Hearing Examiner finds, based on the preponderance of the evidence, that the proposed development would have no meaningful adverse effects on traffic conditions. The evidence indicates that utilities are readily available, and that forest conservation and stormwater management regulations can be satisfied. With regard to public schools, for the reasons stated in Part III.G. above, the Hearing Examiner finds it reasonably probable that available public school facilities and services will be adequate to serve the proposed development if it is approved for rezoning (although school facilities payments will likely still be required).

Nevertheless, given the primacy of coordinated and systematic development in evaluating the public interest of acting on a rezoning application, the Hearing Examiner concludes that approval of the present application in its current form would not be in the public interest.

C. Conclusions

Based on the foregoing analysis and after a thorough review of the entire record, I reach the following conclusions:

1. The submitted Development Plan is not in substantial compliance with the Sector Plan.
2. The Development Plan does not fully comply with the purposes, standards and regulations of the PD-44 Zone and does not provide for a form of development that will be compatible with adjacent development.
3. The Development Plan proposes internal vehicular and pedestrian circulation systems and points of external access that will be safe, adequate and efficient.
4. The proposed development will satisfy environmental requirements.

5. No documents have been submitted to show the ownership and method of perpetual maintenance of areas intended to be used for recreational or other common or quasi-public purposes, but the testimony of the Applicant's representative establishes that if the project goes forward, the church intends to arrange for maintenance of the common areas.

6. The proposed rezoning would not be in the public interest under the proffered Development Plan.

VI. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-864, requesting, on remand, that 1.87 acres of land located at 8011 and 8015 Old Georgetown Road, Bethesda, Maryland, in the 7th Election District, be reclassified from the R-60 Zone to the PD-44 Zone under a Development Plan specified as Exhibit 417(a), be *denied*.

Dated: September 29, 2010

Respectfully submitted,

Martin L. Grossman
Hearing Examiner